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13

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF APPEALS.

—OF—

WEST VIRGINIA

At the January and June Terms 1889.

—BY—

ALFRED CALDWELL,

ATTORNEY GENERAL AND EX OFFICIO REPORTER.

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OF THE
SUPREME COURT OF APPEALS

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ATTORNEY-GENERAL AND EX OFFICIO REPORTER,

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TABLE OF CASES REPORTED.

Alderson <i>v.</i> Commissioners,	454
Commissioners,	640
Alkire <i>and</i> Lewis,	504
Arnold <i>v.</i> Coburn,	272
Atkinson <i>and</i> Bank,	203
Bank <i>v.</i> Atkinson,	203
Corder	232
Lumber Co.,	357
Bee <i>and</i> Neely,	519
Beardsley <i>and</i> Sands,	594
Bennett <i>and</i> Norman,	614
Biggs <i>v.</i> Huntington,	55
Bodkins <i>and</i> Boggs,	566
Boggs <i>v.</i> Bodkins,	566
Bridge Co. <i>v.</i> Pt. Pleasant,	328
Bromley <i>and</i> Pasley,	21
Browse <i>and</i> Jones,	444
Bullington <i>v.</i> N. N. & M. V. Co.,	436
Burton <i>v.</i> Gibson,	406
Bushong <i>v.</i> Rector,	311
Calvert <i>and</i> Hescht,	215
Carr <i>v.</i> Wilson,	419
Central Land Co. <i>v.</i> Laidley,	134
Chalfant <i>and</i> Ogden,	559
Chenowith <i>v.</i> County Court,	628
Childs <i>v.</i> Hurd,	66
Coburn <i>and</i> Arnold,	272
Coffman <i>and</i> Hedrick,	119
Cohn <i>v.</i> Ward,	34

Commissioners and Alderson,	454
Same,	640
Fleming,	637
Connell v. Connell,	319
Corder and Bank,	232
Core v. Wigner,	277
Corrothers v. Jolliffe,	562
County Court and Chenowith,	628
Cox and Taylor's Ex'r.,	148
Crumlish v. Railroad Co.,	244
Damron v. Ferguson,	33
Davis v. Living,	174
Pt. Pleasant,	289
Dunbar and Sewing Machine Co.,	335
Ferguson v. Damron,	33
Millender,	30
Fidelity Co. v. Railroad Co.,	244
Flack v. Fry,	364
Fleming v. Commissioners,	637
Guthrie,	1
Frame v. Frame,	463
Fry and Flack,	364
Gibson and Burton,	406
Gillespie and Jones,	343
Goff v. Wilson,	393
Goodwin and State,	177
Guthrie and Fleming,	1
Gwynn v. Schwartz,	487
Hedrick and Coffman,	119
Hescht v. Calvert,	215
Himan v. Thorn,	507
Hooper v. Hooper,	526
Horner and Lyon,	432
Hughes's Ex'r. and Key,	184
Huntington and Biggs,	55
Hurd and Childs	66
Jeffries,	66
Ingraham and McCutcheon,	378
Insurance Co. and Nease,	283
Jeffries v. Hurd,	66
Johnson v. McCoy,	552
Jolliffe v. Corrothers,	562
Jones v. Browse,	444

TABLE OF CASES REPORTED.

vii

Jones v. Gillespie,	343
Keiter and Sherrard,	144
Same,	147
Key v. Hughes's Ex'r,	184
Kilbreth and Roots,	585
King and Talbott,	6
Laidley and Central Land Co.,	134
v. Smith,	387
Law and Zinn,	447
Lewis v. Alkire,	504
Living and Davis,	174
Lorentz v. Lorentz,	556
Love v. Tinsley,	25
Low v. Settle,	600
Lumber Co. and Bank	357
Lyon v. Horner,	432
Millender and Ferguson,	30
Miller v. Navigation Co.,	46
McCoy and Johnson,	552
McCutcheon v. Ingraham,	378
McKinsey v. Squires,	41
N. N. & M. V. Co. and Bullington,	436
Rece,	164
Navigation Co. and Miller,	46
Nease and Insurance Co.,	283
Neely v. Bee,	519
Norman v. Bennett,	614
Ogden v. Chalfant,	559
Pasley v. Bromley,	21
Peck and State,	606
Point Pleasant and Davis,	289
Bridge Co.,	328
Railroad Co. and Crumlish,	244
Fidelity Co.,	244
Searle,	370
Rece v. N. N. & M. V. Co.,	164
Rector and Bushong,	311
Richards and State,	348
Roots v. Kilbreth,	585
Ruffner and Walker,	297
Sands v. Beardsley,	594
Schwartz and Gwynn,	487
Searle v. Railway Co.,	370

Settle and Low,	600
Sewing Machine Co., v. Dunbar,	335
Shaw's Adm'r. and West,	195
Sherrard v. Keiter,	144
Same,	147
Smith and Laidley,	387
v. Turley,	14
Squires and McKinsey,	41
State v. Goodwin,	177
Peck,	606
Richards,	348
Tingler,	546
Talbott v. King,	6
Taylor's Ex'r. v. Cox,	148
Thorn and Himan,	507
Tingler and State,	546
Tinsley and Love,	25
Turley and Smith,	14
Walker v. Ruffner,	297
Ward and Cohn,	34
West v. Shaw's Adm'r,	195
Wigner and Core,	277
Wilson and Carr,	419
Goff,	393
Zinn v. Law,	447

TABLE OF CASES CITED.

Abbott v. Smelting Co. 4 Neb. 416	99
Acer v. Westcott, 1 Lans. 193,	269
Adams v. Alkire 20 W. Va. 486,	496
Adams v. Rockwell 16 Wend. 285,	501, 502
African M. E. Church v. Conover 27 N. J. Eq. 157,	362
Alderson v. Commissioners, 31 W. Va. 634,	403
Allen v. Gibson 4 Rand. 468	87
Anderson v. Cranmer 11 W. Va. 552	598
Nagle, 12 W. Va. 98,	29
Andrews v. Avory, 14 Gratt. 229	528
Armstrong v. Grafton, 23 W. Va. 50,	461
Poole, 30 W. Va. 669,	32
Asher v. Texas, 128 U. S. 129,	354
Association v. Thompson, 31 N. J. Eq. 536,	271
Asylum v. Miller, 20 W. Va. 327,	391
Atkinson v. Sutton, 23 W. Va. 197.	29
Attorney-General v. Barstow, 4 Wis. 567.	406
Ayers v. Blair, 26 W. Va. 559,	307
Baker v. Seekright. 1 H. & M. 177,	496
Ball v. Cox, 29 W. Va. 407,	11, 13
Johnson, 8 Gratt. 285,	143
Bank v. Arthur, 3 Gratt. 173,	40
Bellis, 10 Cush. 276,	362
Carrington, 7 Leigh 566,	17
Dandridge, 12 Wheat. 64,	362
Gregory, 49 Barb. 155,	242
Horner, 26 W. Va. 442,	435
Kimble, 76 Ind. 195,	210
Reed, 8 Pick. 459,	87
Barker v. Back, in, 2 Denio 45,	535

Barnett v. Shackelford, 6 J. J. Marsh, 532,	142
Barr v. Fleming, 29 W. Va. 314,	332
Barton v. Barbour, 104 U. S. 126,	446
Batman v. Megowan, 1 Metc. (Ky.) 533,	405
Bauer v. Goltmanhausen, 65 Ill. 499,	502
Baxter v. Brooks, 29 Ark. 173,	405
Bern v. Coal Co. 27 W. Va. 285,	373
Beverly v. Brooks, 2 Leigh. 446 and 4 Gratt. 208,	259
Beverly v. Walden, 20 Gratt. 147,	598
Bias v. Floyd 7 Leigh. 647,	548
Bier v. Gorrell, 30 W. Va. 95,	399
Biglow v. Livingston, 28 Minn. 57,	117
Board v. Parsons, 24 W. Va. 551,	32, 435, 506
Bolling v. Teel, 76 Va. 487,	143
Booth v. Barnum, 9 Conn. 286,	260
Bowyer v. Knapp, 15 W. Va. 278,	507
Boyd's Lessee v. Graves, 4 Wheat. 513,	501
Boyd v. Gunnison, 14 W. Va. 19,	591
Black v. Thomas, 21 W. Va. 713,	494, 506, 635
Black's Adm'rs v. Thomas, 21 W. Va. 709,	443
Blackwell v. Railroad Co. 122 Mass. 1,	9
Blaine v. Railroad Co. 9 W. Va. 252,	373
Blosser v. Harshbarger, 21 Gratt. 216,	494
Bloyd v. Pollock 27 W. Va. 75,	605
Bradford v. Hill, 1 Hayw. (N. C.) 22,	497
Brainard v. Railroad Co. 7 Cush. 510,	10
Brazie v. Commissioners, 25 W. Va. 213,	402
Breckenridges v. Todd, 3 T. B. Mon. 52,	241
Brewer v. Railroad Corp. 5 Metc. 478,	502
Brick v. Brick, 66 N. Y. 144,	131
Bridge 30. v. Louisville, 81 Ken. 189,	332
Summers, 13 W. Va. 484,	8
Bridges v. Shalcross, 6 W. Va. 562,	397
Briscoe v. Ashby, 24 Gratt. 454,	370
Brush v. Ware, 15 Pet. 93,	271
Burnham v. Boston, 10 Allen 290,	64
Burnley v. Duke, 2 Rob. (Va.) 130,	528
Burt v. Thomas, 29 W. Va. 442,	240
Timmons, 29 W. 441,	213, 417, 452
Burwell v. Fauber, 21 Gratt. 463,	271
Butler v. Muscatine, 11 Ia. 433,	295
Camden v. Werniger, 7 W. Va. 528,	32
Campbell v. Campbell, 22 Gratt. 649,	32, 341

TABLE OF CASES CITED.

xi

Capehart v. Cunningham, 12 W. Va. 759,	33
Carleton v. Reddington, 1 Fost. 291,	502
Carlton's Adm'r v. Ruffner, 12 W. Va. 297,	33
Caskie's Ex'rs v. Harrison, 76 Va. 85,	531
Caylus v. Railroad Co. 10 Hun. 195,	269
Challam v. Shippam, 30 Eng. Ch'y 555,	189
Chapman v. Chevis, 9 Leigh 297,	435
McMillan, 27 W. Va. 220,	103
Town, of Milton, 31 W. Va. 384,	61
Cheaney v. Hooser, 9 B. Mon. 330,	295
Cheatham v. Hatcher, 30 Gratt. 56,	128
Chenowith v. Commissioners, 26 W. Va. 230,	403, 462
Cherry v. Slade's Adm'r. 3 Murph. 82,	496
Christie v. Malden, 23 W. Va. 667,	54
Cirode v. Buchanan, 22 Gratt. 205,	160
City of Scranton v. Hill, 102 Pa. St. 378,	63
City of Wheeling v. Campbell, 12 W. Va. 56,	391
Claffin v. Railroad Co. 8 Fed. Rep. 118,	271
Clark v. Brown, 8 Gratt. 549,	49
Curtis, 1 Gratt. 289,	87
Clough v. Bond, 3 Mylne &c. 496.	189
Cockerel v. Nichols, 8 W. Va. 159,	435
Coles v. Withers, 33 Gratt. 201.	
Wooding, 2 Pat. & H. 189,	496
Collin v. Knoblock, 25 La. Ann. 263,	406
Commonwealth v. Runk, 26 Pa. St. 235,	447
Conlin v. Aldrich, 98 Mass. 557,	396
Connor v. Coffin, 22 N. H. 541,	103
Cooley v. Porter, 22 W. Va. 120,	193
Core v. Cunningham, 27 W. Va. 207,	30, 241, 417
Core v. Faupel, 24 W. Va. 238,	578, 605
Corrothers v. Sargent, 20 W. Va. 351,	534
Covington v. Southgate, 15 B. Mon. 491,	295
Cowen v. Fauntleroy, 2 Bibb 261,	496
Cox v. Cox, 26 Gratt. 305,	476
Craigen's Ex'r v. Lobb, 12 Leigh 627,	555
Crawford v. Carper, 4 W. Va. 56.	212
Creigh's Adm'r v. Boggs, 19 W. Va. 240,	425
Crowel v. Maughs, 2 Gilm. 419,	502
Crumlish v. Railroad Co., 28 W. Va. 623,	251
Cunningham v. Hedrick, 23 W. Va. 579,	275
Dance v. Seaman, 11 Gratt. 748,	39
Darlington v. McCoole, 1 Leigh 36,	476

Davis v. Harman, 21 Gratt. 194,	190
Dearborn v. Parks, 5 Greenl. 81.,	536
Decouch v. Sevetier, 3 John. Ch'y 190,	193
Deu v. Judges, 3 Hen. & M. 1,	396
Dibble v. Rogers, 13 Wend. 536,	501
Dickey v. Reed, 78 Ill. 261,	643
Dickinson v. Railroad Co., 7 W. Va. 391,	29
Dimmey v. Railroad Co., 27 W. Va. 32,	377
Dinges v. Branson, 14 W. Va. 100,	558
Dogan v. Seekright, 4 H. & M. 25,	496
Doggett v. Helm, 17 Gratt. 96,	309, 325
Doonan v. Glynn, 28 W. Va. 715,	44
Douglas v. Stephenson, 75 Va. 756,	340
Dow v. Railroad Co. 20 Fed. Rep. 768,	89
Dower v. Church, 21 W. Va. 23,	123, 131
Doyle v. Mizner, 42 Mich. CCM,	99
Drew v. Smith, 46 N. Y. 204,	497
Drury v. Foster, 2 Wall. 33,	362
Dryden v. Swinburn, 15 W. Va. 234 and 20 W. Va. 89,	456, 643
Dubois v. Kelley, 10 Barb. 496,	103
Dudleys v. Dudleys, 3 Leigh 436,	129
Duncan v. Custard, 24 W. Va. 731,	28
Eckert v. Flowry, 43 Pa. St. 46,	131
Edelen v. Edelen, 11 Md. 415,	211
Edwards v. Beebe, 48 Barb. 106,	441
Elliott v. Piersol. 1 Pet. 328,	139
Elwes v. Maw, 3 East 38,	102
Emerick v. Tavener, 9 Gratt. 230,	317
Evans v. Shroyer, 22 W. Va. 581,	539
Evans's Appeal, 81 Pa. St. 302,	325
Ex parte Smith, 8 S. C. 495,	406
Farish v. Reigle, 11 Gratt. 697,	375
Fewell v. Kessler, 30 Ind. 195,	361
Field v. Cooks, 16 La. Ann. 153,	99
Flagg v. Eames, 94 Am. Dec. 363,	362
Flanagan v. Gimmet, 10 Gratt. 421,	176
Floyd v. Harding. 28 Gratt. 410,	478
Forde's Case, 16 Gratt. 547,	181
Forth v. Staunton, 1 Saund. 211,	537
Franklin v. Insurance Co. 43, Mo. 491,	287
Freeman v. Freeman 43 N. Y. 34,	476
French v. Loyal Co., 5 Leigh. 641,	259
Motley, 63 Me. 326,	210

TABLE OF CASES CITED.

xiii

Fullam v. Adams, 37 Vt. 397,	537
Gaither v. Gaither, 20 Ga. 709,	131
Galbraith v. Galbraith, 5 Gan. 409,	477
Gardner v. Gardner, 34 N. Y. 155,	131
Gardner's Case, 3 Gratt. 655,	331
Geeten v. Woodcock, 7 Mees. & W. 14,	103
Gilbert v. Insurance Co. 23 Wend. 43,	386
Gilman v. Telegraph Co., 91 U. S. 603,	87
Gilmer's Adm'r v. Baker's Adm'r., 24 W. Va. 72,	530
Gilmore v. Morris, 13 Mo. App. 114,	361
Glidden v. Strupler, 52 Pa. St. 402,	138
Taylor, 16 Ohio St. 509,	418
Goelet v. Gori, 31 Barb. 314,	242
Goodall v. Stuart, 2 Hon. & M. 105,	157
Goodnough v. Sheppard, 28 Ill. 81,	318
Goolsbon v. St. John, 25 Gratt. 163,	200
Grayson's Case, 6 Gratt. 712,	494
Greathouse v. Sapp, 26 W. Va. 87,	52
Grier v. Shackelford, 2 Tread. (S. C.) 642,	405
Grimstone v. Carter, 3 Paige 421,	478
Groff v. City, 44 Md. 67,	296
Hadduck v. Wilmarth, 5 N. H. 181,	478
Hagedon v. Bank, 1 Pin. 61,	91
Hall v. Hall, 12 W. Va. 1,	294
Hancock v. Railroad Co., 3 Gratt. 328,	49
Handly's Lessee v. Anthony, 5 Wheat. 364,	331
Handy v. Scott, 26 W. Va. 710,	591
Harden v. Wagner, 22 W. Va. 356,	40
Hardesty v. Richardson, 44 Md. 617,	477
Harriman v. Southam, 16 Ind. 190,	361
Harris v. Cook, 28 N. J. 345,	266
Harvey v. Tyler, 2 Wall. 342,	294
Harwood v. Marshall, 9 Md. 83,	396
Railroad Co. 17 Wall. 81,	309
Hatch v. Hatch, 9 Mass. 367,	361
Hawker v. Railroad Co. 15 W. Va. 628,	373
Hayward v. Bank, 96 U. S. 611,	325
Henderson's Case, 29 W. Va. 147,	551
Henderson v. Smith, 26 W. Va. 829,	402
Henry v. Davis, 13 W. Va. 252,	32, 341
Herzog v. Weiler. 24 W. Va. 199,	213, 452
Heth v. Railroad Co., 4 Gratt. 482,	265
Heyder v. Association, 42 N. J. Eq. 403,	266

Hickok v. Hickok, 13 Barb. 632,	390
Higginbotham v. Higginbotham, 10 B. Mon. 369,	318
Higgins v. Building Co., 2 Atk. 107,	87
Hill's Case, 5 Gratt. 682,	356
Hill v. Boston, 122 Mass. 349,	64
Hill v. Proctor, 10 V. W. Va. 78,	21
Hinchman v. Ballard, 7 W. Va. 152,	239
Hinson v. Lot, 8 Wall. 148,	350
Hoffman v. Bircher, 22 W. Va. 537,	33
Hooper v. Hooper, 29 W. Va. 285,	528
Hopkins v. Richardson, 9 Gratt. 494,	536, 614
Hoult, v. Donnahue, 21 W. Va. 294,	597
Howell's Case, 5 Gratt. 664,	507
Howery v. Helm, 20 Gratt. 1,	306
Hudgens v. Kemp, 18 Hou. 530,	548
Hudson v. Putney, 14 W. Va. 561,	480
Hughes v. Mount, 23 W. Va. 130,	215
Hulick v. Scovel, 4 Gilman 191,	361
Hunter's Executors v. Hunter, 10 W. Va. 321,	209, 418
Hutchinson v. Kellam, 3 Munf. 202,	49
Insurance Co. v. Francis, 11 Wall. 210,	171
French, 18 How. LOL,	171
Morris, 20 Wall. 445,	170
Morrison, 11 Leigh 354,	385
Morse, 20 Wall. 445,	173
Jackson v. Bowen, 1 Caines 358,	501
Dieffendorf, 3 Johns. 269,	501
Douglas, 8 Johns. 266,	501
Dysling, 2 Caines 198,	500
Freer, 17 Johns. 29,	500
Gardner, 8 Johns. 308,	501
Ligon, 3 Leigh 161,	265
McCall, 10 Johns. 377,	501
Ogden, 9 Johns. 238,	501
Smith, 9 Johns. 100,	501
Stevens, 16 Johns. 110,	242
VanCorlaer, 11 Johns. 123,	501
Vedder, 3 Johns. 8,	501
Jarrett v. Jarrett, 11 W. Va. 384,	598
Jessee v. Parker's Adm'rs, 6 Gratt. 57,	128
Johnson v. Fullerton, 44 Pa. St. 466,	315
Railroad Co., 25 W. Va. 570,	378
Jones v. Porter, 32 Pen. & W. 132,	579

TABLE OF CASES CITED.

xv

<i>Kaufle v. Delaney</i> , 25 W. Va. 410, . . .	368
<i>Keffer v. Grayson</i> , 76 Va. 517, . . .	477, 484
<i>Kellog v. Smith</i> 7 Cush. 375, . . .	501
<i>Kelly v. Pittsburgh</i> , 104 U. S. 78, . . .	295
<i>Kelly's Case</i> , 8 Gratt. 632, . . .	13
<i>Kenicott v. Supervisor</i> , 16 Wall. 469, . . .	266
<i>Keys v. Village of Marcellus</i> , 50 Mich. 439, . . .	63
<i>Kilpatrick v. Smith</i> , 77 Va. 347, . . .	643
<i>Kinsley v. Monongalia Co.</i> 31 W. Va. 451, . . .	631
<i>Kip v. Norton</i> , 12 Wend. 17, . . .	127
<i>Klee v. Reitzenberger</i> , 23 W. Va. 749 . . .	40
<i>Kniffen v. McConnell</i> , 30 N. Y. 285. . .	45
<i>Knight v. Capito</i> , 23 W. Va. 639, . . .	38, 101
<i>Knox v. Thomson</i> , 1 Litt. (Ky.) 350, . . .	478
<i>Koontz's Case</i> , 31 W. Va. 173, . . .	551
<i>Kurtz v. Hibner</i> , 55 Ill. 521, . . .	477
<i>Kyle v. Harveys</i> , 25 W. Va. 716, . . .	39
<i>Laidley v. Land Company</i> , 30 W. Va., . . .	603
<i>Lakeman v. Robards</i> , 9 Mo. App. 179, . . .	267
<i>Lamberts v. Cooper's Ex'r.</i> , 29 Gratt. 61, . . .	131
<i>Lane Co. v. Oregon</i> , 7 Wall. 77, . . .	332
<i>Langford v. Gascoyne</i> , 11 Ves. 333, . . .	189
<i>Lawhorn's Case</i> , 18 Gratt. 93, . . .	429
<i>Leader v. Homeward</i> , 5 C. B. (N. S.) 546, . . .	103
<i>Leffingwell v. Warren</i> , 2 Black, 599, . . .	353
<i>Leftwich v. Neal</i> , 7 W. Va. 569, . . .	139
<i>Le Neve v. Le Neve</i> , 2 Lead. Cas. Eq. 132, . . .	259
<i>Leonard v. Vredenburg</i> , 7 Johns. 29, . . .	537
<i>Lessee of Syler v. Eckhart</i> , 1 Bin. 380, . . .	477
<i>Levy v. Arnsthall</i> , 10 Gratt. 641, . . .	611
<i>Lewis v. Caperton</i> , 8 Gratt. 148, . . .	39
<i>Livesay v. Beard</i> , 22 W. Va. 585, . . .	515
<i>Lobdell v. Lobdell</i> , 33 How. Prac. 347, . . .	476
<i>Lockhard v. Beckley</i> , 10 W. Va. 88, . . .	241, 417, 518
<i>Long v. Weller</i> , 29 Gratt. 353, . . .	271
<i>Lumber Co. v. Ward</i> , 30 W. Va. 43, . . .	98
<i>Machine Co. v. Gage</i> , 100 U. S. 676, . . .	353
<i>Mackey v. Cox</i> , 18 How. 104, . . .	528
<i>Mahon v. Baker</i> , 26 Pa. St. 519, . . .	477
<i>Manufacturing Co. v. Coal Co.</i> 8 W. Va. 409, . . .	259, 524
<i>Marling v. Marling</i> , 9 W. Va. 79, . . .	477
<i>Marshall v. Railroad Co.</i> 16 How. 314, . . .	171
<i>Martin v. Dix</i> , 52 Miss. 53, . . .	296

<i>Martin v. Smith</i> , 25 W. Va. 527,	19, 201
<i>Mason v. Bridge Co.</i> 20 W. Va. 223,	32, 648
<i>Mastard v. Woldford</i> , 15 Gratt. 329,	139
<i>Matthews v. Brise</i> , 6 Beav. 239.	190
<i>Miller</i> , 25 W. Va. 817,	275
<i>Mattox v. Helm</i> , 5 Litt. 186,	318
<i>Hightshue</i> , 39 Ind. 95,	139
<i>Maxwell v. Hanshaw</i> , 24 W. Va. 405,	452
<i>Mayer v. Adams</i> , 27 W. Va. 251,	294
<i>Mayo v. Fletcher</i> , 14 Pick. 525,	88
<i>Mead v. Lord Orrery</i> , 3 Atk. 244,	87
<i>Melendy v. Barbour</i> , 78 Va. 544,	446
<i>Memphis v. Lasser</i> , 9 Humph. 757,	64
<i>Merrithrew v. Andrews</i> , 44 Barb. 207,	478
<i>Merrit v. Smith</i> , 6 Leigh. 493,	143
<i>Meyers v. Zetelle</i> , 21 Gratt. 733,	190
<i>Middleton v. Selby</i> , 19 W. Va. 168,	201, 282
<i>Midkiff v. Lusher</i> , 27 W. Va. 439,	33
<i>Miller v. Blose's Ex'r.</i> 30 Gratt. 650,	16
<i>Railroad Co.</i> 36 Vt. 445,	259
<i>Mining Co. v. Herkimer</i> , 46 Ind. 142,	99
<i>Woodbury</i> , 14 Cal. 425,	99
<i>Mobile v. Kimball</i> , 102 U. S. 697,	350
<i>Moore v. Halt</i> , 10 Gratt. 284,	163
<i>Wheeler</i> , 10 W. Va. 42,	19
<i>Morford v. Unger</i> , 8 Ia. 82,	295
<i>Morgan v. Morgan</i> , 3 Stew. (Ala.) 383,	478
<i>Moss v. Gallimore</i> 1 Doug. 279,	87
<i>Moulton v. Reid</i> , 54 Ala. 320,	4
<i>Muller v. Dows</i> , 94 U. S. 444,	171
<i>Mundy v. Vawter</i> , 3 Gratt. 513,	265
<i>Murdock v. Welles</i> 9 W. Va. 552,	28
<i>Murry v. Sell</i> , 23 W. Va. 480,	17
<i>McClintock v. Ochiltree</i> . 4 W. Va. 249,	439
<i>McClung v. Livesay</i> , 7 W. Va. 329,	54
<i>McCormick v. Barnum</i> , 10 Wend. 104,	501
<i>McDowell's Executor v. Crawford</i> , 11 Gratt. 377,	494
<i>McGinnis v. Curry</i> , 13 W. Va. 29,	16, 213, 452
<i>McIntyre v. Association</i> , 40 Ind. 104,	99
<i>McKenzie v. Railroad Co.</i> 27 W. Va. 306,	242
<i>McLain v. School Directors</i> , 51 Pa. St. 196,	477
<i>McMasters v. Edgar</i> , 22 W. Va. 673,	213
<i>Insurance Co.</i> 25 Wend. 379,	288

TABLE OF CASES CITED.

xvii

McMechen v. McMechen, 17 W. Va. 692,	126
Neal v. Commonwealth, 21 Gratt. 511,	51
Neale v. Neale, 9 Wall. 1,	477
Neely v. Jones, 16 W. Va. 625,	539
Rules, 26 W. Va. 68,	275
Newcomb v. Brooks, 16 W. Va. 32,	306
Newman v. Mollohan, 10 W. Va. 505,	32
Niblett v. Nashville, 12 Heisk. 624,	64
Nicholas v. Kirschner, 20 W. Va. 251,	131
Nichols v. Heirs of Nichols, 8 W. Va. 175,	340, 557
Noble v. City of Richmond, 31 Gratt. 271,	61
Noyes v. Rich, 52 Me. 115,	87
Nuckols v. Jones, 8 Gratt. 267,	182
O'Brien v. Stevens, 11 Gratt. 610,	159
Odlin v. Greenleaf, 3 N. H. 270,	390
Parks v. Jackson, 11 Wend. 442,	473
Pasey v. Gardner, 21 W. Va. 470,	16
Pasel v. Virginia, 8 Wall. 177,	353
Peale v. Phipps, 14 How. 368,	447
Pearson v. Keedy, 6 B. Mon. 128,	531
Peck v. Weddell, 17 Ohio St. 271,	644
Pendleton v. Smith, 1 W. Va. 16,	175
Penton v. Robart, 2 East 88,	103
People v. Crissey, 91 N. Y. 616,	406, 426
North, 72 N. Y. 124,	406, 426
Supervisors, 100 Ill. 495,	406
Pierce v. Emery, 32 N. H. 484,	259
Pigg v. Corder, 12 Leigh 69,	576
Poe v. Machine Works, 24 W. Va. 517,	458
Poindexter's Case, 23 W. Va. 805,	552
Poole v. Dilworth, 26 W. Va. 583,	146
Powell v. City of Parkersburg, 28 W. Va. 698,	296, 334
Clark, 5 Mass. 355,	497
Stratton, 11 Gratt. 792,	528
Powell's Case, 11 Gratt. 822,	551
Pulaski Co. v. Stuart, 28 Gratt. 872,	294
Pusey v. Gardner, 21 W. Va. 470,	309
Quarrier v. Insurance Co., 10 W. Va. 507,	286
Quidort's Adm'r v. Pergeaux, 18 N. J. Eq. 472,	418
Radcliff v. Poundstone, 23 W. Va. 724,	538
Railroad Co. v. Alabama, 107 U. S. 581,	171
Bastian, 15 Md. 494,	257
Cowdry, 11 Wall. 459,	89

Dinsmore, 108 U. S. 30,	548
Dunlap, 29 Ind. 426,	373
Gettle, 3 W. Va. 376,	372
Harwood, 90 Ill. 425,	375
Koontz, 104 U. S. 5,	168
Miller, 19 W. Va. 408,	332
Peniston, 18 Wall. 29,	332
Skeels, 3 W. Va. 556,	439
Wheeler, 1 Black 286	171
Wheeling, 13 Gratt. 40,	648
Wightman, 29 Gratt. 431,	372
Railway Co. v. Whittin, 13 Wall. 270,	171
Raisbeck v. Oesterricher, 4 Abb. New Cas. 444,	99
Raper v. Sanders, 21 Gratt. 60,	265
Ravenswood v. Flemings, 22 W. Va. 52,	331
Reed's Heirs v. VanNorsdale, 2 Leigh 569,	476
Reitz v. Bennett, 6 W. Va. 417,	539
Renick v. Ludington, 20 W. Va. 513,	242
Rhea v. Jordan, 28 Gratt. 683,	475
Robbins v. Taxing District, 120, U. S. 489,	353
Roberts v. Halstead, 9 Pa. St. 32,	271
Rockwell v. Adams, 7 Cow. 761,	501
Rogers v. Benson, 5 Johns. Ch'y 431,	242
Higgins, 48 Ill. 211,	139
Johns, 42 Tex. 339,	406
Verlander, 30 W. Va. 656,	30, 38, 101, 515
Ross v. Gill, 1 Wash. Va. 88,	494
Rowland v. Witherden, 3 Mac. & G. 568,	190
Royce v. Goodwin, 22 Mich. 496,	460
Russell v. Topping, 5 MacI. 202,	361
Ruhl v. Ruhl, 24 W. Va. 279,	648
Salway v. Salway, 11 Eng. Ch'y 215,	189
Sanaker v. Cushwa, Adm'r 3 W. Va. 29,	635
Sauer v. Schelenberg, 33 Md. 288,	45
Savage v. O'Neill, 44 N. Y. 298,	310
Sayre v. Edwards, 19 W. Va. 359,	536
Schaffner v. Reuter, 37 Barb. 49,	210
Scott v. Battle, 85 N. C. 185,	142
Seabright's Case, 2 W. Va. 591,	548
Seborn v. Beckwith, 30 W. Va. 774,	265
Sharp v. Donovan, 17 B. Mon. 177,	295
Shed v. Shed, 3 N. H. 432,	362
Sheff v. Huntington, 16 W. Va. 307,	61, 494, 635

TABLE OF CASES CITED.

xix

Shepherd v. Bevill, 9 Gill. 32,	476
Sherman v. Rawson, 102 Mass. 395,	45
Sherwood v. Whiting, 54 Conn. 330,	362
Shiflett v. Commonwealth, 14 Gratt. 652,	547
Shivers v. Simmons, 54 Miss. 520,	143
Shobe's Ex'rs v. Carr, 3 Munf. 10,	476
Sinclair v. Worthy, 84 Am. Dec. 357,	318
Sipe v. Earman, 26 Gratt. 563,	89
Shipwith v. Young, 5 Munf. 276,	49
Smith v. Clay, 2 Amb. 645,	309
Davis, 4 Gratt. 50,	496
Myers, 109 Ind. 1,	4
Smith, 62 Ill. 493,	256
Yoke, 27 W. Va. 639,	44
Snead v. Osborne, 25 Cal. 626,	500
Spence's Case, 2 Leigh 751,	552
Spotswood v. Higginbotham, 6 Munf. 313,	286
Stafford v. Richardson, 15 Wend. 302,	390
State v. Baxter, 28 Ark. 129,	405
Cooper, 26 W. Va. 338,	183
Harmon, 31 Ohio St. 250,	406
Hurst, 11 W. Va. 75,	494
Irwin, 30 W. Va. 404,	648
Lewis, 51 Conn. 113,	406
Marlow, 15 Ohio St. 114,	405
Mason, 77 Mo. 189,	406
Miller, 26 W. Va. 106,	392
Plants, 25 W. Va. 119,	331
Thompson, 21 W. Va. 756,	494
Steadman v. Wilbur, 7 R. I. 481,	210
Stewart v. Lavender, 30 Ark. 594,	318
Stokes v. Oliver, 76 Va. 72,	477
Stone v. Wilson, 10 Gratt. 529,	435
Strother v. Hull, 23 Gratt. 640,	231
Sturm v. Fleming, 22 W. Va. 404,	200
Swann v. Summers, 19 W. Va. 115,	286
Swarthout v. Curtis, 5 N. Y. 302,	265, 271
Sykes v. Pawlet, 43 Vt. 446,	63
Talbert v. Stewart, 39 Cal. 602,	117
Taylor v. Carryl, 24 Pa. St. 259,	91
Insurance Co. 51 N. H. 50,	288
King, 6 Munf. 358,	270
Tazewell's Executor v. Barrett, 4 Hen. & M. 263,	117

Teal v. Walker, 111 U. S. 248,	87
Templeman v. Fauntleroy, 3 Rand (Va.) 446,	117
Thatcher v. Powell, 6 Wheat. 119,	294
Thomas v. Crout, 5 Bush 37	102
Thompson v. Catlett, 24 W. Va. 525,	103
Ewing, 1 Brewst. 67,	644
Railroad Co. 9 Wall. 590,	332
Thornton v. Thornton, 3 Rand. (Va.) 179,	242
Tilley v. Railroad Co. 29 N. Y. 252,	376
Todd v. Gates 20 W. Va. 464,	446
Tolman v. Sparhawk, 5 Metc. 469,	502
Tracy v. Tracy, 15 W. Va. 243,	475
Trader v. Jarvis, 23 W. Va. 108,	257, 309, 325
Troll v. Carter, 15 W. Va. 582,	17
Trumbull v. Insurance Co. 12 Ohio 305,	390
Tunstall v. Pollard, 11 Leigh 1,	528
Turner v. Althaus, 6 Neb. 54,	296
Turnpike Co. v. Crockett, 2 Sneed 271,	64
Tuttle v. Jackson, 6 Wend. 223,	478
Tysen v. Railroad Co. 13 Am. & Eng. R. Cas. 134,	261
Umbarger v. Watts, 25 Gratt. 167,	49
Unis v. Charlton, 12 Gratt. 484,	182
Vandion v. Roberts, 4 W. Va. 493,	33
Vangilder v. Hoffman, 22 W. Va. 1.	598
Van Wyke v. Wright, 18 Wend, 157,	501
Vest's Case 21 W. Va. 796,	548
Vinal v. Core, 18 W. Va. 1,	439
Wall v. Hinds, 4 Gray. 256,	102
Walling v. Michigan. 116 U. S. 453,	353
Walton v. Develing, 61 Ill. 301,	3, 645
Wandling v. Straw, 25 W. Va. 692,	294
Ward v. Lewis, 4 Pick. 518,	362
Maryland, 12 Wall. 418,	350
Washington v. Railroad Co. 17 W. Va. 190,	378
Watson v. Sutherland, 5 Wall. 78,	286
Watts v. Kinney, 3 Leigh. 293,	271
Webb v. Dye, 18 W. Va. 376,	128
Webber v. Virginia, 103 U. S. 350,	350
Wells v. Board, 20 W. Va. 156,	54
Wells v. Padgett, 8 Barb. 323,	45
Welton v. Missouri, 91 U. S. 275,	350
Wharf Co. v. Jedd. 108 Mass. 224,	362
Wickham v. Lewis, 13 Gratt. 440,	259

TABLE OF CASES CITED.

xxi

Wilder v. Houghton, 1 Pick. 87,	87
Wilkins v. Ellet, 9 Wall. 740,	528
Williams v. County Court, 26 W. Va. 488,	54
William's Case, 14 W. Va. 869,	547
Wilson's Adm'rs v. Barclay's Ex'r, 22 Gratt. 534.	157
Winans v. Winans, 22 W. Va. 678,	207
Winkler v. Railroad Co., 12 W. Va. 699,	439
Woodruff v. Parham, 8 Wall. 125,	353
Wright v. Ore Co. 45 Pa. St. La.,	115
Wright v. Puckett, 22 Gratt. 370,	478
Yates v. Shaw, 24 Ill. 367,	502
Young v. Glendenning, 6 Watts 510,	477

TABLE OF CONSTITUTION STATUTES AND CODE CITED.

Const. Art. III, sec. 3. Trial by Jury.....	43
IV, sec. 9. Elections and Officers.....	424
6. " "	423
V, Division of Power.....	404
VII, sec. 3. Executive Department—Election.....	5
4. " " "	481
16. " " "	423
VIII, sec. 3. Supreme Court of Appeals.....	48
X, sec. 9. Taxation and Finance.....	332
Acts 1872-3, ch. 118, sec. 33, 64. Election Law.....	398
194, sec. 31. Roads.....	11
1875, ch. 39. Charter of the City of Charleston.....	363
1885, ch. 17. Licenses.....	349
ch. 20. Taxation.....	351, 352
Code, ch. 6. Contested Elections.....	398
(1868,) ch. 13, sec. 16. Statutes and Rules of Construction..	175
ch. 29, sec. 26. Assessment of Taxes.....	539
63. " "	334
31, sec. 29. Sale of Real Estate for Taxes.....	176
35, sec. 20. Recovery of Claims due the State.....	391
41, sec. 35. Sheriffs and Jailers.....	434
43, sec. 31. Roads, Bridges &c.....	11
53. " "	60
47, secs. 31, 48. Cities, Towns and Villages	296, 331
50, secs. 17, 30, 32. Justices and Constables.....	553
54, sec. 30. Joint Stock Companies	170
80, sec. 35. Ejectment.....	314
82, sec. 8. Guardians and Wards.....	231
66, sec. 6. Property and Rights of Married Women....	314
71, sec. 2. Qualities of Estates.....	537
74, secs. 1, 10. Acts void as to Creditors.....	28, 597
77, secs. 26, 28, 29, 31. Wills.....	120
87, sec. 17. Fiduciaries Generally.....	231
90. Writs of Prohibition and <i>Certiorari</i>	459
93, sec. 12. Rents.....	114

xxiv TABLE OF CONST. STATUTES AND CODE CITED.

Code, ch. 99, sec. 11.	Contracts in Writing.....	506
103, sec. 6.	Actions for Injuries.....	377
104, sec. 14.	Limitation of Suits.....	418
106, secs. 31, 32.	Attachments.....	611
124, sec. 2.	Order of Publication.....	553
125, sec. 29.	Rules and Pleadings.....	372
131, secs. 4, 5.	Trial by Jury.....	43
135, sec. 1.	Appeals to the Court of Appeals.....	48, 49
7.	" " " " " " " ".....	547
137, sec. 31.	Fees of Officers.....	555
141, secs. 4, 15.	Executions.....	286, 610
158, sec. 10.	Presentments and Indictments.....	356

REPORTS OF DECISIONS
OF THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA.

JANUARY TERM, 1889.

CHARLESTON.

FLEMING v. GUTHRIE.

Submitted January 12, 1889.—Decided January 12, 1889.

39	1
39	644
32	1
39	406
32	1
49	17
32	1
53	376
32	1
58	656
32	1
64	597

1. JURISDICTION—INJUNCTION.

A court of equity has no jurisdiction to enjoin the Secretary of State from delivering to the speaker of the House of Delegates the sealed returns of an election for Governor properly transmitted to him, and such injunction, if granted, will be treated as a nullity. (pp. 3-6.)

2. JURISDICTION—INJUNCTION—MANDAMUS—PROHIBITION—SUPREME COURT.

This Court will not award a writ of prohibition against a Circuit Court to prohibit it from proceeding by *mandamus* to compel the Secretary of State to deliver such returns, on the petition of a party, who alleges no other ground or interest in the matter than the fact, that he is the plaintiff in said injunction-suit, and that the Circuit Court has ignored his injunction, although it appears, that said court had no jurisdiction to award said *mandamus*. (p. 6.)

O. Johnson, J. W. St. Clair and Brown & Jackson for petitioner.

J. A. Hutchinson and W. P. Hubbard for respondent.

SNYDER, PRESIDENT :

On January 10, 1889, A. B. Fleming presented his petition to this Court, in which he alleged, that on January 9, 1889, he exhibited his bill in equity to A. N. Campbell, a Circuit judge of this State, and obtained from him an injunction restraining Henry S. Walker, Secretary of State, from laying before the Legislature of the State the certificate of the commissioners of the County Court of Kanawha county, purporting to ascertain the result of the general election held in said county on November 6, 1888, for the office of Governor of this State; that, after said injunction had been perfected and served upon said Walker, Nathan Goff, who was also a defendant to said bill of injunction, without any notice to the petitioner applied to F. A. Guthrie, Judge of the Circuit Court of Kanawha county, in term for a writ of *mandamus* to compel said Henry S. Walker, Secretary as aforesaid, to do what he had been enjoined from doing by said bill; that Judge Guthrie being fully advised of the existence of said injunction announced from the bench, that he would ignore and treat as naught said injunction, and thereupon he did ignore said injunction and award a *mandamus nisi*, returnable at 9 o'clock A. M. on January 10, 1889, commanding said Walker, Secretary as aforesaid, to forthwith deliver said certificate to the Speaker of the House of Delegates of the Legislature; the said Walker has no personal interest in said injunction or *mandamus* proceedings; and that petitioner is the real and only opposing party in interest against the said Goff in any of said matters. The petition prayed for a rule against said Guthrie, Judge *etc.*, and said Goff, to show cause why a writ of prohibition should not issue prohibiting said Guthrie, Judge *etc.*, from holding for naught and setting aside said injunction and prohibiting him and the said Goff from proceeding in said *mandamus* case without notice to petitioner or opportunity for him to appear and defend his interests therein.

The rule was awarded as prayed for, returnable on January 11, 1889, at which time the respondents appeared and moved the court to quash the rule. On the motion of the petitioner his petition was so amended as to show, that the injunction bill averred, that a writ of *certiorari* had been sued out of the Circuit Court of Kanawha county by petitioner against the county commissioners of said county to supervise and correct the action of said commissioners in canvassing the vote for governor at the election of November 6, 1888; that said writ had been sued out on January 4, 1889, and was still pending; and that said county commissioners had transmitted said certificate to said Walker, Secretary *etc.*, on December 15, 1888.

The motion to quash the rule after having been argued by counsel for the respective parties was on January 12, 1889, submitted to this Court for its decision.

It is contended by the respondents, that the injunction awarded by Judge Campbell referred to in the petition was void, because a court of equity has no jurisdiction to restrain a public officer from performing a plain duty required by the constitution. On the other hand it is insisted for the petitioner, that, if any jurisdiction existed for the injunction, then the action of the Circuit Court in the *mandamus* proceedings is such an abuse of its powers and jurisdiction as will be prevented by prohibition. It is thus apparent that the important question is: Did the Judge have jurisdiction to award said injunction?

In *Walton v. Develing*, 61 Ill. 201, it was held that, "Where the law plainly requires an officer to perform a duty, and he is not exceeding or abusing his powers but fairly acting within the same, and a court issues a writ to restrain him from its performance, he must discharge his duty as prescribed by the law." That case was a proceeding for contempt against election officers for holding an election in disobedience to an order of injunction, and in which the court held, that the injunction having been issued without authority was void, and that there was no contempt in disobeying it. The court in its opinion says: "In such case what must control the officer,—the mandate of the court or the plain behests of the law? The court, as well as the inferior officer, must be governed by the law. When the law imposes a positive duty

upon a public functionary, and a court commands him not to perform it, he must obey the law and disobey the writ of the court."

In *Moulton v. Reid*, 54 Ala. 320, it was decided, that a court of equity has no jurisdiction to enjoin the person declared elected to a municipal office from using his certificate of election, where the law provides for a contest.

In *Smith v. Myers*, 109 Ind. 1, (9 N. E. Rep. 692,) it was held, that "the courts have no jurisdiction of a suit to enjoin the secretary of state from delivering to the speaker of the house of representatives the sealed returns alleged to be wrongful and illegal of an election for lieutenant governor, which are directed to the speaker as required by law in care of the secretary and are to be delivered to him by the latter." The court in its opinion says:

"It is a principle of constitutional law, declared in our constitution and enforced by many decisions of our own and other courts, that the departments of government are separate and distinct, and that the officers of one department shall not invade any other. To interfere by injunction in this case would involve a violation of this fundamental principle, as a conflict between two great departments of the government would result from an exercise of the jurisdiction invoked by the appellant. The general assembly has power to compel the attendance of persons at its sessions, and to compel the production of papers which are necessary to enable it to justly and intelligently discharge its duties and exercise its functions. If the judiciary should enjoin the secretary of state from delivering to the speaker the papers described in the complaint, and the general assembly should demand their delivery to the officer to whom they are addressed, a conflict of authority would arise which no tribunal could effectually determine. If the secretary should, in such case, yield to the demand of the general assembly, he would be in contempt of the authority of the court, and liable to punishment; if, on the other hand, he should disobey the command of the general assembly, he would be in contempt of its authority, and subject to punishment. If the general assembly should deem it the duty of the secretary of state to deliver the papers, it would not require the aid of the courts

to compel its performance, for it possesses the power to corece the production of papers and documents: * * * It is apparent, therefore, that as, on the one hand, the general assembly would not require the aid of the courts, by *mandamus* or otherwise, to compel the production of papers addressed, by direction of the constitution and the statute, to the presiding officer of one of its branches, so, on the other hand, the courts can not by injunction restrain it from obtaining those papers, nor by indirection produce that result by stopping them in the hands of one whom the law makes a mere custodian."

Our constitution and statute in respect to the question before us are almost identical with those of Indiana, and the facts in the case, from which I have quoted, and the one at bar are so nearly alike as to make the opinion, from which the above quotation is taken a very apposite though not an absolutely binding authority in the case under consideration.

Without referring to other authorities, of which there are many, it is sufficient to say, that according to well-settled principles of law I am clearly of opinion, that under our constitution and statutes a court of equity has no jurisdiction to award an injunction in a case such as the one made in the petition in this case. Our constitution (article VII, § 3) declares: "The returns of every election for the above-named officers (one of whom is the governor) shall be sealed up and transmitted by the returning officers to the secretary of state, directed to 'the speaker of the house of delegates,' who shall immediately after the organization of the house, and before proceeding to business, open and publish the same, in the presence of a majority of each house of the legislature, which shall for that purpose assemble in the hall of the house of delegates;" and ample provision is made by statute to compel the production of papers before either house of the legislature. Code 1887, c. 12, § 7. The 18th section of article VI of the constitution provides, that the regular biennial session of the legislature "shall commence on the second Wednesday of January," which for the year 1889 was on the 9th day of January.

It is thus shown, that, at the time the injunction in ques-

tion was granted, the legislature was in actual session, indeed it was presumably this very fact, that prompted its issuance; for otherwise there could have been no delivery of the election-returns by the secretary of state, and therefore no necessity for the injunction. And the legislature, a co-ordinate branch of the state government, being in session and having exclusive control over the said certificate or election returns for governor and possessing plenary power to compel their delivery, the courts had no jurisdiction or control over said returns by injunction or otherwise. They had been delivered to the Secretary of State in the manner prescribed by law, before any proceedings had been taken in the courts in respect to them, as is shown in the petition in this case. As the statute (section 23, ch. 3, Code) has made it the positive duty of the Secretary of State to deliver the same to the Speaker of the House, the said injunction was an absolute nullity and constituted no ground for the refusal of said officer to discharge that duty.

It will be observed, that the said injunction is the only ground alleged in the petition for the writ of prohibition, and, while it is apparent, from what we have already said, that the *mandamus* complained of was improperly awarded by the Circuit Court, yet, as the petitioner does not by his petition show such interest or right as would entitle him to interfere in or complain of said *mandamus*, we can not at his instance for any ground alleged in his petition take cognizance of said proceedings or award the writ of prohibition.

For these reasons the motion to quash the rule is sustained, and the writ denied.

WRIT DENIED.

CHARLESTON.

TALBOTT v. KING.

Submitted January 19, 1889.—Decided January 29, 1889.

1. NUISANCE—INJUNCTION—PUBLIC ROAD.

An individual can not enjoin a public nuisance, such as the obstruction of a road, unless it works special and peculiar injury

39	6
34	128
32	6
36	240
32	6
39	204
32	6
46	287
40	416
32	6
41	67
32	6
50	237
32	6
52	306
32	6
54	286
54	429
32	6
54	143
57	335

to him, and that injury must not be trivial, or such as may be compensated in damages, but must be serious affecting the substance and value of the plaintiff's estate. The first point of syllabus in *Bridge Co. v. Summers*, 13 W. Va. 476, reaffirmed. (p. 8.)

32	6
61	517
61	518
61	606
32	6
165	767

2. PUBLIC ROAD—USER—DEDICATION.

Mere *user* of a road will not make it a public road, under section 31, c. 43, Code 1887. The *user* must be accompanied either by an order of the County Court recognizing it in some way as a road, or the road must be worked by a surveyor as such. Dedication by the land-owner, though accompanied by public *user*, will not make it a public road, unless the dedication be accepted either by the County Court in its order-book or by a surveyor's working it. (p. 10.)

J. Bassel and Dayton & Dayton for appellant.

S. V. Woods for appellee.

BRANNON, JUDGE:

Robert R. Talbott presented to the judge of the Third Circuit his bill, stating that he resided in road precinct 5, in Barbour county, on what is known as the "Belington Road," a main thoroughfare for all that section of densely populated country between Valley river, at Belington, and the Staunton and Parkersburg turnpike, for a distance of many miles; that in said precinct is a public road called the "Davitt Road" running through lands of defendant, John King, Owen Davitt, and Timothy Caveny, from a point on said Belington road near the Talbott church to a point, where the same intersects a road known as the "River Road," and thence to its intersection with another road known as the "Roaring Creek Road;" that plaintiff had erected at great expense and keeps in constant operation at a farm near said Belington road a large and valuable steam saw and grist mill, the only mill accessible to a large number of people living along said Belington road and the only one for all the people living on the Davitt road; that very many of the patrons of plaintiff's mill have no other means of reaching it besides by the Davitt road, unless by a distant, circuitous and inconvenient route many miles out of their way; that near said mill are a store, post-office, school-house, cattle-scales and blacksmith-shop, which are inaccessible to many of said people except by said Davitt

road, in which store and scales plaintiff is part owner; and that, as many customers of said store are in the habit of making one trip to store, post-office and mill with the same conveyance, if they are deprived of said road for the purpose of reaching the store, post-office and church, they can not reach the mill and will not patronize plaintiff; and that King had fenced, obstructed and destroyed said road and refused to permit persons to pass over it to said mill and store, whereby their customers were turned away, their business and profits diminished, and irreparable damage done to the plaintiff; and praying an injunction to restrain King from obstructing the road, which was granted.

The defendant demurred and answered, and in his answer denied all the material allegations of the bill specifically. The answer states, that for some years, while the lands in its course were uncleared and before the establishment of other roads afterwards in the answer mentioned, some people in the Roaring creek country made a path through the woods near the line of the alleged Davitt road, which path was changed as the lands were cleared; that it was never established by law or otherwise, never worked by a surveyor and never by the public regarded as a public road, and was in places almost impassable; and that its establishment would ruin his farm. Said answer further alleges, that the County Court recognizing the fact, that said path was no public road, established a public road substantially parallel with and at some points not more than forty five rods distant from said path and entering said Belington road, whereby any customers could reach said mill by travelling less than three quarters of a mile further from the section, which the bill alleged would be inconvenienced, and whose custom would be lost by shutting said pathway. The answer denied all special damage to the mill.

No replication was made to this answer, but both parties took depositions of numerous witnesses. The cause was heard on bill, demurrer, answer and depositions, the injunction was perpetuated, and King appeals.

The first question to be decided is whether the plaintiff can maintain his bill for a public nuisance. In *Bridge Co. v. Summers*, 13 W. Va. 484, GREEN, P., says: "A court of equity ought not to interfere by injunction to prevent a public

nuisance when the party asking its aid shows no private injury actually sustained or justly apprehended by him. The obstruction to a public highway, to justify the interposition of a court of equity, must be more than a mere public nuisance,—it must work a special injury to the plaintiff; and such injury must not be trivial, and such as may be fully compensated in an action at law. But if the right of the public to the use of a highway is clear, and a special injury is threatened by an obstruction of the highway, and this special injury is serious, reaching the very substance and value of the plaintiff's estate, and is permanent in character, a court of equity by an injunction ought to prevent such a nuisance."

This must be regarded a fair exposition of the law. We do not see that the plaintiff's case fills its measure. We can not here follow the voluminous evidence in detail. It seems that this road is of minor importance, by no means largely contributing to the support of the plaintiff's mill and store, and that by means of another established road known as the "Stalnaker Road," referred to in the answer and described in the proof, all the persons, except two or three, (perhaps we should say one,) can reach them by going 208 rods further over perhaps a better road, and those two or three may through their own lands have access thereto. The loss of custom from stopping this road must be very small and trivial, by no means serious, or reaching the substance or value of plaintiff's property, as it must do under the rule above laid down.

In the case cited from 13 W. Va. the road obstructed was the approach of a toll-bridge on one end, being of vital importance to it, and its obstruction would thus sap its life. Not so here. This road was not the only road leading to store and mill, indeed did not lead directly to the mill, but entered the Belington road at some distance from the mill, and only contributed to its business in a degree, and those travelling on it could with equal ease practically reach the Belington road by the Stalnaker road. Chief Justice GRAY in *Blackwell v. Railroad Co.*, 122 Mass. 1, says: "If a bridge is constructed across a navigable stream and arm of the sea, the direct injury is to the navigation, which is a public interest, and the fact, that the plaintiff alone navigates the river

and is owner of the only wharf above the bridge, being merely proof, that the consequential damage to him is greater in degree than to others, does not establish his right to maintain an action, as other riparian owners may suffer in the same way, whenever they use the stream." See, also, High, Inj. § 525.

Were it the law, that any one consequentially sustaining damage from obstruction of a road like others or even greater in degree than others may go into equity by injunction, a vast field of private litigation would be opened. To justify it, the injury must be special and peculiar to the plaintiff, and moreover serious and certainly depreciating the value and enjoyment of his estate. The highways are the common property of all and by our law are under the guard and care of the state. For their obstruction the law gives a remedy by indictment. The general rule of law is well settled, that individuals can not enforce a public right or redress a public injury by suits in their own names. *Brainard v. Railroad Co.*, 7 Cush. 510. Endless would be the litigation, were every individual allowed to do so upon his own impulse or for private ends. It is safer and more prudent to trust the vindication of the public right to the public prosecutors and grand juries, and courts' should rather limit than widen the jurisdiction to entertain private suits in such cases.

The second question in this cause is: Was the road in question a public highway? It was certainly originally a path cut out by Miles King in the forest for his convenience. Then a neighbor, Davitt, settling there extended it for his convenience, and other paths extending it were made, and it has been for many years, say twenty seven, used by all having occasion to pass over it. It was fenced off as the land was cleared. Miles King made fences along it; so did John King. It is very narrow, not rising to the height of an ordinary road; rather a path than a road; too narrow in places for a wagon; very steep, with rocks in places, difficult to pass. No order of the Barbour County Court either establishing or recognizing it is shown or suggested. The end of it in Randolph, if that could be certainly called a part of it, was by that County Court made a highway and worked by surveyors and then discontinued as too steep. It was never

worked by surveyors in Barbour county. Davitt, a surveyor, living on it, interested in its establishment, after this controversy arose, after King closed it, with his boy and a man named Coonts, to whom he allowed credit for one hour's work, did some work, but that work was in removing the fence, which King had erected across it, and a little tree which had fallen over it. A man named Caveny under Davitt worked a day, but this was after King closed it. Davitt was surveyor two years but did no work there the first year nor the second, except as stated. He says his predecessor, Surveyor Poling, did not work it, and was asked if one named Durrett worked it, but the record gives no answer to this question. He says he never worked it with the assembled road hands and never knew any other surveyor to do so. He was asked if he knew of any other road in his precinct that had not been worked for twenty five years or twenty six years by a surveyor and hands and answered that he did not. He had resided there thirty years, and had ample opportunity of knowing of such work, if any had been done. Two other surveyors—Poling, a surveyor when his deposition was taken and for a term before, and Durrett, a surveyor at two different times for two years each—say they did not work it; knew of no surveyor doing so; and, though asked to work it, they pointedly declined to do so, because they did not consider it a road and did not feel called on by law to work it. Thus this road was never worked by surveyors, and we have two surveyors declaring it not a public road and refusing to work it.

The plaintiff relies on section 31 of chapter 43 of Warth's Code, which provides that every road used and occupied as a public road shall be taken and deemed to be a public road in all courts and places, wherever the establishment thereof shall come in question. What is the meaning of this statute? In *Ball v. Cox*, 29 W. Va. 407 (1 S. E. Rep. 673) the court quoting the act of 1872-73, c. 194, § 31, that "every road worked as a public road under the direction of a surveyor of roads shall in all courts and places be deemed a public road," held, that every road worked as a public road under the direction of a surveyor of roads shall in all courts of this State be deemed a public road, although it may not appear, that

the same was formally established by an order of the County Court." The section as amended in 1881 leaves out the words, "worked as a public road under the direction of a surveyor of roads," and substitutes the words, "used and occupied as a public road."

We do not think this change of phraseology has changed the meaning. To be a public road under the act of 1881 it must be "used and occupied," both verbs being employed, and used and occupied as a public road. It must be not only used as a public road,—the people do that; their passage over it is transient,—but must be occupied as a public road; that is completely taken possession of for purposes of easement, shutting out other conflicting control, and occupied as a public road by public authority,—a function performed by the County Court or its agent, the public officer called the "surveyor." The occupation, to shut out the perfect use of the owner, must be either by order of the County Court or by the surveyor's working it as a road. It must have some stamp of public authority upon it beyond mere *user* by the public, and that is the being taken possession of and worked and held out by the surveyor to be a road, at least. To require the sanction of public authority to at least this extent is not hurtful to the public convenience and insures the public safety to an extent greater than would the construction, that mere naked use by the public in passing makes it a public road.

Our law requires all public roads to be worked at public expense and makes the county liable for damages for injuries arising from non-repairs; and if mere use by the public unsanctioned by order of the court or the surveyor makes the road a public road, grievous damages and burdens might fall upon the public; and such a rule would be so indefinite as to render it well nigh impossible to determine what were public and what were not public roads. It would endanger private property, taking land by mere *user*, and making it a road without compensation would endanger private property. But if we require the sanction of the court or the occupation of the road by the public officer by those visible open acts which manifest to the world its adoption by the public authority, the public liability for maintenance and

damages is tested by a reasonable rule and limit, and the owner of the land seeing the public officer working the roads knows of the public claim, and, if he acquiesces for any long time, will be held estopped from denying the validity of the road.

Kelley's case, 8 Gratt. 632, holds, that mere *user* of a road by the public for however long a time will not constitute it a public road, but it must be shown to have been established or by some action recognized by the County Court; and that a road may become a public road by dedication of a right of passage to the public by the owner of the soil and an acceptance by the public, but that dedication without acceptance will not establish a road; and that this acceptance must be by the County Court on its records, before it will be a public road. We think the law of Kelley's Case good now under our present road-act with the qualification, as provided by our act, that acceptance by the surveyor of roads evinced by open control and working of it, as roads are commonly worked, stands in lieu of an order by the County Court. Dedication, though accompanied by *user* by the public, not accepted by the court or the surveyor will not fasten it on the public as a public road. Mere *user* by the public, unless it be sanctioned by a recorded court order or by work and control by the surveyor, will not deprive the owner of the soil of his right and make it a public road; but such *user* by the public and work by the surveyor, if acquiesced in for a long time by the owner, will estop him from denying its existence.

Notwithstanding the change of phraseology in section 31 of chapter 43 of the Code, as amended by chapter 14, Acts 1881, from former acts, we still adhere to the first point of the syllabus in *Ball v. Cox*, 29 W. Va. 407 (1 S. E. Rep. 673) requiring, that to make a public road it must be worked by a surveyor. It is claimed that Miles King, grantor of John King, dedicated this road to public use. If he did, such dedication not having been accepted by the court or by surveyors working it, two surveyors having on the contrary refused to regard it a public road or to do work on it, the dedication alone would not make it a road; and, the question of dedication being one of mere fact, we do not deem it necessary to to decide it.

The decree of the Circuit Court of Barbour county in this cause must be reversed, the injunction dissolved, the bill dismissed, and the appellant recover from appellee his costs both in this Court and in the Circuit Court.

REVERSED. DISMISSED.

CHARLESTON.

SMITH v. TURLEY.

Submitted January 11, 1889.—Decided January 20, 1889.

1. HUSBAND AND WIFE—RESULTING TRUST.

Quere, whether a resulting trust arises in favor of a wife, if the husband acquires property with her separate estate, and without her knowledge and consent takes title in his name. If so, the proof must be clear and explicit to establish that fact especially against husband's creditors.

2. HUSBAND AND WIFE—RESULTING TRUST.

Long lapse of time will defeat its enforcement. (p. 16.)

3. HUSBAND AND WIFE—RESULTING TRUST.

It must arise at the time the title is taken. No subsequent oral agreement or payment will create it. (p. 17.)

4. HUSBAND AND WIFE—RESULTING TRUST.

The wife is incompetent to prove any transaction or communication personally between herself and her husband going to create or sustain the trust or any admissions by him of its existence, not only as against his heirs, but also his creditors seeking to subject the property. (p. 20.)

5. ANSWER—NEW MATTER—REPLY—COMMON-LAW PLEADING.

An answer containing new matter calls for reply in writing under secs. 35, 36, ch. 125 Code only when such new matter in its nature, as applied to the cause, calls for affirmative relief against some of the parties and is not simply matter of defence of plaintiff's case; and it may by its matter call for such reply only from certain of the parties and not from others, or only as to part of its matter and not as to the residue thereof. (p. 19.)

6. PARTIES.

The personal representative must be a party before debts can be decreed against a decedent's estate. (p. 20.)

Simms & Enslow for appellant.

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J. H. Ferguson for appellee.

BRANNON, JUDGE:

In 1860 Elijah Turley purchased in his own name a tract of 292 acres of land in Cabell county at a sale under decree, and a deed was made to him. He held the land until his death in 1884, leaving Agnes Turley, his widow, and certain children. In February, 1885, D. L. Smith filed his bill in equity in the Circuit Court of Cabell county to sell this land to pay judgments recovered against Elijah Turley in 1877, making Agnes Turley and said children defendants. Agnes Turley filed her answer alleging that said land had been purchased by Elijah Turley with money belonging to her, derived from two deceased uncles; that part of the money (\$637.49) derived from one of the uncles she directed her husband to invest in this land, it being distinctly understood between her and her husband, that the title to said land, when purchased, should be conveyed to her, and that she always understood and believed during his life, that it had been conveyed to her, and never knew to the contrary until after his death; that he always called it her land; and that afterwards she derived about \$2,200.00 from the estate of another uncle, out of which she paid the balance of the purchase-money not paid at the time of the purchase.

It appears from the evidence, that in 1860 \$637.49, money of Agnes Turley and her sister from an uncle's estate, was paid on the land by their receipting to the commissioner for that amount on their shares in the proceeds of the sale of the land of the uncle's estate, said tract of 192 acres being a part thereof; and that in 1870 \$1,200.00 out of the \$2,200.00 derived by Agnes Turley from another uncle was paid on the land. Under a reference the plaintiff's and various other debts considerable in amount were reported against Turley's estate.

In her answer Agnes Turley prayed that said land be exempted from debts of her husband, and that his heirs be required to convey the legal title of the land to her in execution of the alleged trust. The court held the land not liable to Turley's debts and dismissed Smith's bill, and Smith obtained an appeal to this Court.

The claim of Agnes Turley to exempt the land is based on the theory of a resulting trust from the purchase of the land with her money under agreement with her husband, that it was to be acquired in her name. In *McGinnis v. Curry*, 13 W. Va. 64, Judge GREEN says: "It is well settled, that, where upon a purchase of property the conveyance of the legal title is taken in the name of one person, while the consideration is given or paid by another, the parties being strangers to each other, a resulting trust immediately arises from the transaction, and the person named in the conveyance will be a trustee for the party, from whom the consideration proceeds." And it seems that where a husband purchases land in his own name with the separate estate of his wife, a trust arises in her favor. 1 Perry Trusts, § 127, citing many cases. Usually a trust comes from the fact, that the wife's money has been used in the purchase, and without her knowledge or consent the deed is taken in the husband's name. Wells, Mar. Wom. §§ 213, 214, p. 258.

But Mrs. Turley's case does not meet the requirements of the law. The deed to her husband was made in May, 1860. The purchase had been confirmed in his name by decree in the open court prior to the date of the deed, and the deed was put on the public record in 1867, and she allows this important matter to sleep, and her husband to die as late as 1884 without obtaining a deed, taking no step to assert her claim, until her husband's creditors attack the land, when she filed her answer, in February, 1885. In substantially the language of Judge CHRISTIAN in *Miller v. Blose's Ex'r*. 30 Gratt. 750, after the lapse of a quarter of a century it is claimed, that this land, though held by Turley for this great length of time under a deed absolute on its face and long on record informing his creditors and the world, who chose to deal with him, that the land was absolutely his, can not be subjected to his debts, and that he held the naked legal title as trustee for his wife. Courts will not enforce a resulting trust after a great length of time or laches on the part of the supposed *cestui que trust*. *Pusey v. Gardner*, 21 W. Va. 470. Lapse of time, when not a statutory bar, operates in equity as evidence of assent, acquiescence or waiver. Same case, point 7 of syllabus.

In *Troll v. Carter*, 15 W. Va. 582, Judge GREEN says: "So too all the authorities agree, that an equitable claim of any sort and especially one, which depends on parol testimony only, will not be recognized after great lapse of time, during which it has been ignored, where no satisfactory reason can be assigned for not setting up the claim sooner. And this is more especially true, when the equitable claim is of a character, which required clear and explicit evidence to sustain it; such lapse of time itself rendering the evidence, which might otherwise have been regarded as sufficiently clear and explicit, unsatisfactory."

The fact, that defendant's husband being indebted and knowing the land to be in danger from his debts should let the matter lie, and die without executing a deed to satisfy this call upon his conscience, is a circumstance against the claim she now sets up. On the facts developed by the evidence the case is not strong enough. The court of Virginia in *Miller v. Blose*, 30 Gratt. 751, says that "the evidence to establish such a claim, in the face of absolute deeds so long of record, must be very clear and explicit, and such as to leave no doubt as to the character of the transaction." The facts must be proved with great clearness and certainty. 1 Perry Trusts, § 137. Judge GREEN in *Troll v. Carter*, 15 W. Va. 582, says that, "if the statute of frauds in any case be inapplicable, and a trust of land be permitted to be established by parol evidence, to establish such a trust the evidence must be full, clear and satisfactory." See *Bank v. Carrington*, 7 Leigh, 556.

Again, a resulting trust must arise at the time of the execution of the conveyance; for a resulting trust can not arise by after-agreement, by matter *ex post facto*. Judge SNYDER's opinion in *Murry v. Sell*, 23 W. Va. 480; 1 Perry Trusts, § 133. Payment before or at the time of the purchase is indispensable. A subsequent payment will not by relation attach a trust to the original purchase. *Miller v. Blose*, 30 Gratt. 751. As the money paid in 1860 was under the law the husband's, as the wife's then existing estate when realized would be his, no trust could then arise from its payment. Subsequent payment of other money, though her separate estate, years after the legal title had been conveyed to him,

can not raise a trust. H. J. Samuels, commissioner, who sold and conveyed the land to Turley, as a witness says nothing of any declaration of Turley at the time, that he was buying for his wife. He does say, that he heard Turley say, he expected the purchase-money to come out of proceeds going to Agnes Turley and her sister out of the Dundas estate, so far as it would go towards paying. But the payment of some of the money for the land was long deferred, and this declaration may have been made long after the conveyance, and would not necessarily imply that he was buying for her in the face of the fact, that he bought in his own name, especially as this money in 1860 would not be her separate estate but his, when realized. It expressed the mere expectation, that he could get the money to pay from that source. The money paid in 1860 was the husband's *ex jure mariti*, not hers, so far as is disclosed.

It is to be noted, that Mrs. Turley in evidence does not say, there was an agreement or understanding between her and her husband at the time of the purchase, that he should buy for her. She merely says he paid for it with her money and called it her land. She realized some \$2,200.00 from another uncle, and in 1870 \$1,200.00 of it was paid on her husband's debt for this land. When asked, if she knew, whether any of this money was applied to the land, she replied that she did not, but so understood. Only \$1,200.00 of this money is proven to have gone on the land, and that as far back as 1870. This proof is not the clear explicit proof leaving no doubt, required in such secret trusts as this. It might well be said, that as to all these moneys a gift to her husband was intended; that she neither contracted for nor expected its return, or that land should be bought in her name; and that it is only when the storm has come, the shelter of this trust is sought. That she made no effort in this direction for so long, and only when creditors came against the land, strongly confirms this view.

In *McGinnis v. Curry*, 13 W. Va. 29, this Court presumed a gift from wife to husband and denied a trust, though it was clear that the proceeds of her land had paid for the land in question. This transaction is between husband and wife and, if sustained, defeats the honest debts of Turley after an

ownership of twenty five years on evidence almost solely of the wife, and that not very explicit; and the leaning of this Court in *McGinnis v. Curry* and in a series of decisions on kindred questions in contests between the wife and the husband's creditors is towards creditors, to the extent at least of requiring full proof of all the elements to bring the case to the standard of exemption. It is well that the law on this matter should be definitely understood. If any one is to suffer, it should be the negligent *cestui que trust* rather than just creditors.

Counsel for appellee relies on the fact, that there was no reply in writing to Agnes Turley's answer, claiming that for that reason no proof of its allegations is necessary. If it required such reply of the plaintiff complaining of this decree, certainly this position would be correct. As to the heirs of Turley Agnes Turley's answer alleging new matter calling for affirmative relief from them, alleging that her husband purchased for her and was her trustee, and praying specific execution by them of the trust by a conveyance to her, demanded such reply. But as to Smith it was simply matter of defence of the land against his debts. It asked no relief as against him,—simply sought a dismissal of his bill; and, while the answer does contain new matter, that matter calls for no relief against him. To fall under sections 35 and 36 of ch. 25 of the Code, the answer must not only contain new matter, (many answers contain that,) but that matter must call for affirmative relief against the party, from whom such reply in writing is demanded.

In *Moore v. Wheeler*, 10 W. Va. 42, it is held, that an answer alleging new matter for affirmative relief in the meaning of said statute was intended to be simply in lieu of a cross-bill, and not to make any other change in practice. A cross-bill implies a pleading by a defendant against the plaintiff or other defendants or both to bring into the cause and enforce new matter not merely in bar. The statute makes now one pleading perform the two functions of an answer in bar and a cross-bill for affirmative relief; and logically why may not the answer be divisible as to matter and parties, when some of the matter is only in bar of plaintiff's demand, or the matter is in bar of said demand as to some of the defendants only,

thus calling for a reply in writing as to some of the matter only or from some of the defendants, and only a general replication as to the other matter or from the other defendants? We think the answer did not call for a reply in writing from Smith.

As to the error assigned, that Turley's personal representative was not a party, had debts been decreed against his estate and the land, his heirs might assign such error, but, as the bill was dismissed without such decree, it seems the plaintiff can not sustain this assignment.

The appellant assigns as error, that Mrs. Turley's evidence is incompetent as to declarations of her husband. If by this is meant, that his declarations, however proven, are inadmissible under all circumstances, the position is untenable. Admissions of the nominal purchaser and grantee in the deed are admissible. 1 Perry Trusts, § 137. Especially admissions when not in debt, and long before the controversy with creditors. *McGinnis v. Curry*, 13 W. Va. 68. But if it is meant, that she is incompetent to testify as to transactions between her and her husband or his declarations, the assignment is well made under sec. 23, ch. 130, Code, which renders a party incompetent to give evidence of such transactions and communications with a deceased person against parties claiming as his heirs. True, that statute does not expressly exclude such party from giving evidence against creditors of the deceased; but creditors claiming under heirs as to lands in a sense stand in their shoes. If Mrs. Turley establishes the trust, she overthrows the title of the heirs and also the relief of the creditors as a consequence. Giving evidence against the heirs she gives evidence against the creditors, and as to the heirs she is incompetent under the letter of the statute, and as to the creditors incompetent under its spirit. Otherwise her children willing to let her sustain her claim might make no exception and thus defeat creditors, if said creditors could not except for incompetency. This position is sustained by Judge SNYDER in *Martin v. Smith*, 25 W. Va. 587.

This Court is required to render such decree as the Circuit Court should have rendered, but in the absence of the personal representative of Elijah Turley that court could

not have decreed debts against his estate, and consequently this Court can not, and the cause must be remanded without further decree here. *Hill v. Proctor*, 10 W. Va. 78.

Therefore the decree of the Circuit Court of Cabell county pronounced in this cause on the 14th day of December, 1885, must be reversed with cost to the appellant; and the cause is remanded to said Circuit Court with direction to require the plaintiff to make said personal representative a defendant by amended bill, and to proceed further in the cause according to the principles herein indicated and principles governing courts of equity.

REVERSED. REMANDED.

CHARLESTON.

PASLEY v. BROMLEY.

Submitted January 10, 1889.—Decided January 29, 1889.

EVIDENCE—SET-OFF.

B. Executed and delivered to P. a writing in these words: "I this day agree to pay Wm. R. Pasley all the money, that Jesse Pasley's timber comes to after deducting out all the money, that Jesse Pasley * * * * owes me." At the time this writing was executed, B. had been garnished in a Kentucky court by a creditor of Jesse Pasley and was subsequently by the judgment of said court compelled to pay said debt to said creditor. In an action of *assumpsit* by P. against B. on said writing the record in said Kentucky suit is admissible in evidence to prove the payment of the amount, for which he was so garnished as a set-off against the claim of the plaintiff.

Z. T. Vinson for plaintiff in error.

H. K. Shumate for defendant in error.

SNYDER, PRESIDENT:

Writ of error to a judgment rendered September 3, 1886, by the Circuit Court of Wayne county in an action of *assumpsit* brought in said court by William R. Pasley against John B. Bromley. The judgment was on the verdict of a jury and is for the sum of \$703.38. The defendant saved several bills of

exceptions, in one of which all the evidence is certified; and, the court having overruled his motion for a new trial, the defendant has brought the case to this Court.

In our view of the case only one of the numerous errors assigned by the plaintiff in error need be considered by us. The plaintiff's cause of action is the following *assumpsit*, duly signed by the defendant: "I this day agree to pay Wm. R. Pasley all the money, that Jesse Pasley's timber comes to, after deducting out all the money, that Jesse Pasley, James H. Pasley and Elias Williamson owe me. This is for timber, that has been already delivered this 12th day of May, 1884."

The evidence tends to prove, that Jesse Pasley, the father of the plaintiff, was the owner of certain timber, which he had prior to March, 1884, sold to the defendant, Bromley, who had in money and supplies paid the greater part of the purchase-money therefor. In the spring of 1884 the said Jesse Pasley became embarrassed in his business, and certain of his creditors sued him in the Circuit Court of Boyd county, Ky., and among these creditors were D. H. Carpenter and the firm of Williamson & Hampton. Carpenter commenced his action and filed his petition in said court on March 17, 1884, in which he claimed, that said Jesse Pasley was indebted to him in the sum of \$209.00; that the defendant was a non-resident of the state of Kentucky and was disposing of his property with the intent to defraud his creditors. At the same time the plaintiff, Carpenter, sued out an attachment against the estate of Jesse Pasley; and on May 9, 1884, the said Williamson & Hampton commenced their action and filed their petition in said court, claiming that said Jesse Pasley was indebted to them in the sum of \$288.00; that he was a non-resident of the state of Kentucky, and that the said John B. Bromley was indebted to said Pasley; and asking an attachment against the estate of said Pasley and garnishee process against said Bromley. An attachment was issued in each of these actions requiring the sheriff to attach the estate of said Pasley and to summon the garnishees to answer. The attachment in the Carpenter case was served on the defendant Jesse Pasley and said Bromley on March 19, 1884; and in the case of Williamson

& Hampton it was served on said Pasley and Bromley on May 9, 1884. Afterwards, on December 12, 1884, Bromley answered as garnishee and admitted, that, at the time the said attachments were served upon him, he was indebted to the defendant Jesse Pasley in the sum of \$301.00, and asked that the Plaintiffs in said attachments might be compelled to litigate and settle their rights to said fund and determine, which has the prior lien thereon. These two actions were consolidated and finally heard and decided by the said Circuit Court of Boyd county, Ky., and, the court having rendered judgment for the plaintiffs in each case against Jesse Pasley, it held that Carpenter had the prior lien on the fund attached in the hands of Bromley, and thereupon it ordered Bromley to first pay off the judgment in favor of Carpenter and then pay the balance of the said \$301.00 in his hands to the said Williamson & Hampton on their judgment against said Jesse Pasley. In satisfaction of this judgment, and as required by the order of said court, Bromley paid over said sum of \$301.00 to the said Carpenter and Williamson & Hampton.

On the trial of the present action the defendant, Bromley, included this \$301.00 in his account of sets-off and payments filed against the claim of the plaintiff, William R. Pasley, and, in order to prove this item of his account, offered in evidence a duly certified record of the judgment and proceedings in said cases in said Circuit Court of Boyd county, but upon objection by the plaintiff the court refused to permit said record to be read in evidence to the jury; and to this action of the court the defendant excepted. This ruling is assigned as error by the plaintiff in error.

The grounds, upon which this record was excluded by the trial-court, do not appear in the record; but it is contended by the counsel for the defendant in error, that, inasmuch as the defendant, Bromley, had been garnished before he executed the writing, on which this action is founded, and in which he agreed to pay the balance then due from him to the plaintiff as the assignee of Jesse Pasley, and, having made no provision in the said writing for the payment of claims set out in said record, he is not entitled to credit for the amount paid on said claims as against the plaintiff in this

action. It is true this writing does not make any specific reference to these Kentucky claims, but it does in general terms provide and except from its operation as an assignment "all the money that Jesse Pasley owed the defendant for timber." It is admitted that Bromley had been garnished before this writing was executed, and that the debt for which he was garnished was a debt of Jesse Pasley. It follows, therefore, that Bromley was under a legal liability, at the time he executed this writing, to pay these Kentucky debts, and the subsequent payment of them by reason of that liability created a debt in favor of Bromley against Jesse Pasley, which by relation and in legal contemplation arose, at the time the garnishee-process was served upon Bromley, and was therefore, at the time said writing was executed, an existing legal liability or debt in favor of Bromley against Jesse Pasley. It was certainly a conditional liability, which Bromley had no power to escape, and which could not be defeated by Jesse Pasley except by his doing so in the actions of the Boyd county Circuit Court; and, he having failed to do so, though having full notice of the pendency of said actions, even if such notice could be material, neither he nor the plaintiff, who claims under said writing, can be now heard to deny, that the debt arising out of said Kentucky claims was not an existing liability, at the time said writing was executed, and as such excepted from the operation of the assignment to the plaintiff.

For these reasons I think said Kentucky record should have been admitted in evidence, and that the Circuit Court erred in rejecting it.

The other errors assigned relate principally to the order and regularity of the conduct of the proceedings during the trial in the Circuit Court, and as it is not probable, and for the most of them it is impossible, that they can arise on the re-trial of the case, it could subserve no useful purpose for us to notice or consider them. This observation will also apply to the instructions asked and given in the case, because the construction, which we have given to the writing sued on in this case, makes those instructions wholly immaterial.

For the error aforesaid the judgment of the Circuit Court

must be reversed, a new trial ordered, and the case remanded.

REVERSED. REMANDED.

CHARLESTON.

LOVE v. TINSLEY.

*(GREEN, J., absent.)

Submitted January 10, 1889. Decided January 29, 1889.

1. FRAUDULENT CONVEYANCES.

In a suit by a judgment-creditor to set aside a deed as fraudulent it is error to set the deed aside *in toto*, as it is valid and binding between the parties to the fraud and only void as to creditors. (p. 28.)

2. RECORD.

A judgment-creditor in his bill to enforce his judgment lien alleges, that he files as part of his bill copies of his judgment and of the lien-docket marked "Exhibit B" and "C," but "Exhibit B," the copy of the judgment, is not found among the papers or copied as part of the record. It is so probable, that "Exhibit B" never was filed but exists, and it is so necessary to a just decision of the case, that this Court will remand the case to the court below, in order that the plaintiff may have an opportunity to supply said exhibit. (p. 28 *et seq.*)

J. B. Laidley for appellants.

G. J. McComas for appellee.

ENGLISH, JUDGE:

This was a bill in chancery filed in the Circuit Court of Cabell county by S. J. Love, the object of which was to set aside as fraudulent and void a certain deed of conveyance from George F. Miller, Jr., to Lucinda Tinsley, the wife of the defendant A. Tinsley, and to sell the tract of land mentioned and described in said deed of conveyance, and subject the alleged equitable interest of said A. Tinsley in said tract

*On account of illness.

39	25
34	440
32	25
36	796
33	25
40	429
32	25
53	436
32	25
57	37
32	25
166	691

of land to the payment of a judgment-lien in favor of the plaintiff for the sum of \$145.96 with interest and costs, which costs amount to \$2.55. This judgment, the plaintiff claims, he obtained before one A. E. NELSON, a justice of the peace of Cabell county; and that on the 20th day of June, 1885, he caused said judgment to be placed on the judgment-lien-docket of Cabell county. He also claims, that he filed copies of said judgment and lien-docket as part of his bill, marked "Exhibits B and C." The plaintiff also exhibits with his bill a certified copy of the deed from George F. Miller, Jr., and wife to Lucinda Tinsley for said tract of land with the vendor's lien reserved on the face of said deed, to secure the unpaid purchase-money, as exhibit A.

The defendants, A. Tinsley, his wife, Lucinda Tinsley, and George F. Miller, Jr., filed separate answers to the plaintiff's bill. The defendant, A. Tinsley, in his answer denies, that he was indebted to the plaintiff in the early part of the year 1885. He also denies, that the plaintiff obtained a judgment against him before a justice of Cabell county on the 19th of April, 1885, for the sum of \$145.96; and he denies, that plaintiff placed any such judgment upon the judgment-lien-docket in the county clerk's office of Cabell county on the 20th day of June, 1885, or that any such pretended judgment is a lien upon the land mentioned in the bill. He says also that, if any judgment was rendered against him in favor of plaintiff, as he alleges, that the same was procured by fraud and is void and of no effect; that he never had any notice by summons or otherwise of any action or judgment against him in favor of plaintiff. He denies that he owed the plaintiff anything, or that he owned any interest in the land mentioned in the bill, or that he procured the deed for said land to be made to his wife to cheat and defraud his creditors. He also denies that he bought said land, or that he paid any money therefor to said George F. Miller, Jr., or furnished any part of the consideration therefor.

The defendant Lucinda Tinsley in her answer denies, that A. Tinsley was the equitable owner or holder of the equitable title to the land in the bill mentioned, at the time the legal title was in George F. Miller, Jr., or that said A. Tinsley caused the said land to be conveyed to her by said George

F. Miller, Jr. for the purpose of defrauding plaintiff or for the purpose of hindering or delaying the plaintiff in the collection of his pretended claim, and says she bought the land herself, and made the cash-payment recited in the deed exhibited with the bill, and \$67.33 on the deferred payment, and exhibits a receipt from said Miller to herself, dated March 15, 1886, for said last-named amount. She also denies, that the plaintiff obtained the judgment in the bill mentioned, or that he placed said judgment on the judgment-lien-docket of Cubell county on the 20th of June, 1885; and she also denies, that the same, if such there be, is a lien upon said land.

The defendant George F. Miller Jr. in his answer says, that he sold the land to his co-defendant, Lucinda Tinsley, and made her a deed therefor on the 16th day of March, 1885; and avers that the entire transaction was between him and said Lucinda Tinsley, and that he had no contract, dealings or transaction with her husband in reference to said land; that he had no knowledge of any fraud in any way in said transactions; and admits that she paid him the cash-payment, at the time the deed was made, and \$67.00 afterwards, leaving a balance due him on the purchase money of \$239.00.

To these answers the plaintiff replied generally. No depositions were taken in the cause by either side, and on the 20th day of March, 1887, the cause was heard upon the bill and exhibits and upon the said answers and the general replication thereto; and the court below decreed, that the deed aforesaid be set aside, annulled and held for naught, and that unless the defendant, A. Tinsley, or some one for him should within thirty days from the rising of the court pay to the plaintiff the sum of \$163.98 with interest from the date of the decree and the costs of the suit, including the costs before the justice, that then the land should be advertised and sold by a special commissioner therein named.

Now, while the bill alleges, that the defendant A. Tinsley procured this deed to be made by the defendant George F. Miller, Jr., to his wife, Lucinda Tinsley, with intent to hinder, delay and defraud the plaintiff and without any consideration, yet the answers of the defendants, A. Tinsley and his wife, Lucinda, deny this allegation; and the defendant

George F. Miller, Jr., states in his answer, that the entire transaction was with the wife, and that he had no contract or dealings with the husband, A. Tinsley. But suppose the allegations of the bill were true and uncontroverted, yet as between the grantor and grantee this deed would be valid and void only as creditors, and the court below committed an error in decreeing, that the deed from George F. Miller, Jr., to Lucinda Tinsley be set aside, annulled, and held for naught. See Warth's Code, p. 631, § 1, "Every conveyance," etc., "with intent to hinder, delay, or defraud creditors, purchasers or other persons of or from what they are or may be lawfully entitled to, shall as to such creditors, purchasers or other persons, their representatives or assignees be void."

Reviewing the decisions of this Court we find in the case of *Murdock v. Welles*, 9 W. Va. 552, it is held: "It is error to decree such deed null and void in a decree in favor of the judgment-creditor. It should be so held as to the creditor, it being good between the parties." See, also, the case of *Duncan v. Custard*, 24 W. Va. 731, in which this Court holds: "Where a deed is fraudulent as to creditors, but good between the parties, in a suit to subject the land to the liens of creditors it is error to decree the conveyance void *in toto*; such deed should only be declared void as to the creditors of the grantor." Many other decisions to the same effect have been rendered by this Court, but these are sufficient to show the rulings of the Court upon this subject.

The appellant however assigns as further error in this cause, that the material allegations of the bill are not sustained by the evidence, and that on that account it was error to decree against the defendant Lucinda Tinsley, and contends, that the suit should have been dismissed at the plaintiff's cost. This assignment of error evidently refers to the allegation in the plaintiff's bill, that on the 19th day of April, 1885, he obtained before A. E. NELSON, a justice of Cabell county, a judgment against the defendant A. Tinsley for the sum of \$145.96 with interest and costs, which costs amount to \$2.55; alleging further, that a copy of said judgment, marked "Exhibit B," is filed with his bill, while no such exhibit appears as part of the record; and the clerk of the Circuit Court of Cabell county certifies, that no such ex-

hibit was ever filed with the papers in the cause, but in regard to this the clerk may be mistaken. It may have been filed and subsequently lost from the file by the careless handling of attorneys or otherwise; but if a properly certified copy of the transcript of said judgment never was filed and exhibited with plaintiff's bill, it must be conceded, that the plaintiff has not sustained his case by the evidence.

In the case of *Dickinson v. Railroad Co.*, 7 W. Va. 391, in the latter portion of syllabus No. 7, this Court holds: "Where the judgment is put in issue, ordinarily an authenticated copy of such abstract as docketed by the recorder will not be received as proof of the judgment, and dispense with the necessity of producing a properly authenticated copy of the judgment;" and the Court held precisely the same in the case of *Anderson v. Nagle*, 12 W. Va. 98. Under this ruling it must be conceded, that it does not appear from the record, that the plaintiff has proven his case. From the record however it is manifest, that there must have been a judgment of some sort, otherwise the abstract—a copy of which is filed as "Exhibit C" with the bill—would not have been placed on the judgment-lien-docket of Cabell county; and, if such a judgment really existed, it might easily have been proven by supplying "Exhibit B," which seems to be missing from the record.

In regard to defects of this character either in the pleadings or the evidence this Court has heretofore shown a disposition to be somewhat liberal, as will be seen by reference to the case of *Atkinson v. Sutton*, 23 W. Va. 197, 200, in which the Court uses the following language: "While it is generally true, that a court can be called upon only to decide causes, as the parties present them, and cannot be expected to formulate and direct the manner, in which they shall be presented, still, when from the cause as presented by the parties it is apparent to the court that the real questions sought to be determined are not brought before it, either on account of defects in the pleadings or the evidence, it is the duty of the court to require such defects to be removed before proceeding to hear the cause on its merits, or, rather, without having the merits before it; and when an inferior court fails to discharge this

duty, the appellate court will reverse and remand the cause." And the same ruling seems to have been quoted with approval and adopted to some extent in the case of *Rogers v. Verlender*, 30 W. Va. 656 (5 S. E. Rep. 847).

This cause must however be reversed on account of the error in the decree in directing said deed from George F. Miller, Jr., to Lucinda Tinsley to be set aside *in toto*. See *Core v. Cunningham*, 27 W. Va. 207. And in accordance with the liberal rulings and practice indicated in the decisions above cited the cause is remanded to the Circuit Court of Cabell county with leave to the appellee to supply the defects in the record, and for further proceedings to be there had therein according to the principles announced in this opinion; but the appellee must pay to the appellants their costs in this Court expended.

REVERSED. REMANDED.

CHARLESTON.

FERGUSON v. MILLENDER, *et. al.*

Submitted January 10, 1889.—Decided January 29, 1889.

*(GREEN, JUDGE, absent.)

1. COSTS—SETTLEMENT OF SUIT.

Generally, if pending an appeal or writ of error the matter of controversy in the suit be settled, this Court will simply dismiss the appeal or writ of error without deciding the merits merely to determine as to costs, and will not pass on the question of costs. Otherwise, under the circumstances of this cause. (pp. 31, 32.)

2. JUDGMENT—PROCESS.

It is error to render judgment against several defendants, one of them not served with process and not appearing, for which he may, under section 5, c 134 of the Code, reverse the judgment by motion. (p. 32.)

3. JUDGMENT—PROCESS.

If he make such motion, and it is overruled, the decision of the Circuit Court overruling such motion makes such judgment valid and binding, though before void, unless such decision be re-

* On account of illness.

32	30
41	548

32	30
49	308

32	30
46	502

32	30
50	519
150	532

32	30
53	78

32	30
55	238

32	30
56	184

32	30
162	523

32	30
66	84

66	102
66	632

versed; and he is entitled to reverse it, though the judgment has been satisfied by another of the judgment-debtors. (p. 32.)

4. PARTNERS AND PARTNERSHIP—PROCESS—JUDGMENT.

All partners must be served with process for judgment against all. (p. 32.)

Z. T. Vinson for plaintiff in error.

No appearance for defendant in error.

BRANNON, JUDGE.

In an action of *assumpsit* in the Circuit Court of Wayne county by S. J. Ferguson against J. H. Millender, Jacob Zouck, and W. H. Grothe, as partners in the name of J. H. Millender & Co., process was served on Millender and Zouck but not on Grothe. Millender and Zouck appeared and pleaded, but Grothe did not appear; and there was a trial and verdict for plaintiff for \$1,374.94 and judgment against the defendants. Afterwards Grothe moved the Circuit Court to reverse such judgment, assigning in his notice as causes for such reversal, that he had not been served with process had no notice of the action and had not appeared therein. The Court overruled this motion, and he obtained this writ of error.

It is shown to this court, that since the granting of the writ of error Millender has by payment to Ferguson satisfied his demand, and Millender and Zouck ask the dismissal of the writ, while Grothe opposes dismissal and demands a decision of the cause.

A preliminary question is: Shall this Court dismiss the cause or hear it on the merits? Generally it is true, that there must be a matter in controversy during the entire progress of a suit from its inception to final determination both in the lower and appellate court—something on which the final judgment is to operate; and when it appears, that the cause of action has ceased to exist by its discharge, and thus the error complained of is waived or removed, or that it has been released, both courts will stop in the cause, and this Court will dismiss the appeal and will not pass on the question of costs, since the right as to costs can only be decided on a full hearing, which hearing the Court will refuse for the reason just stated.

But this seems to be an exceptional case. While the controversy as between Ferguson and his alleged debtors has been discharged, yet, if as between Grothe and his copartners it is *res judicata*,—if the judgment fixing a liability in favor of Ferguson against the copartners is binding still on Grothe,—he would have to bear his share of it in the way of contribution in the settlement of the partnership accounts and has a right to call on this court to consider his writ of error. It is settled, that if a party sue out a writ of error from a judgment against him, and the judgment is affirmed, the judgment of the appellate court affirming the judgment of the lower court has all the force of *res judicata* and makes that judgment binding. *Armstrong v. Poole*, 30 W. Va. 669, (5 S. E. Rep. 257); *Camden v. Werninger*, 7 W. Va. 528; *Campbell v. Campbell*, 22 Gratt. 649; *Henry v. Davis*, 13 W. Va. 252; *Mason v. Bridge Co.*, 20 W. Va. 223; *Board v. Parsons*, 24 W. Va. 551; *Newman v. Mollohan*, 10 W. Va. 505. If it is a joint judgment, it is binding as a judgment even on parties, who did not appeal and were not served with the appellate process. *Newman v. Mollohan*, Id. 488.

And section 5 of chapter 134 of the Code having made the Circuit Court the forum for the reversal of judgments for error, for which this Court but for that statute would reverse, in case of judgment by default, performing for this purpose the same function which otherwise would be performed by this Court, the judgment of the Circuit Court overruling the motion to reverse, adjudging against the party asking the reversal all his points of error, is logically likewise *res judicata* and makes valid the judgment, unless the action of the Circuit Court overruling the motion to reverse be itself reversed by this Court. Thus the action of the Circuit Court overruling Grothe's motion to reverse the judgment overruling the grounds assigned by him for its reversal, in effect making the judgment, though void before, valid and binding on him under the doctrine of *res judicata*, entitles him to have the decision of this Court upon the merits of his writ of error.

We hold that the rendition of judgment generally against all the defendants—Grothe not having been served with process or appearing in the suit—is error. There should have been service of process on all the partners for judgment against

all. Pars. Partn. §§ 1085, 1086; *Carlton's Adm'r. v. Ruffner*, 12 W. Va. 297. The judgment being joint must be reversed *in toto*. *Midkiff v. Lusher*, 27 W. Va. 439; *Hoffman v. Bircher*, 22 W. Va. 537; 2 Tuck. Bl. Comm. 333; *Vandiver v. Roberts*, 4 W. Va. 493.

For these reasons the judgment of the Circuit Court of Wayne county rendered on the 14th day of June, 1887, overruling Grothe's motion to reverse the original judgment and the original judgment of the said court rendered on the 2d day of June, 1887, must both be reversed, and the verdict of the jury rendered on the 1st day of June, 1887, must be set aside, and the plaintiff in error must recover of the defendant in error his costs in this Court and his costs about said motion in said Circuit Court. *Capehart v. Cunningham*, 12 W. Va. 759. This cause is not remanded, as the matter of controversy has been discharged, and the action is dismissed.

DISMISSED.

CHARLESTON.

DAMRON v. FERGUSON.

*(GREEN, JUDGE, absent.)

Submitted January 10, 1889. Decided January 29, 1889.

1. WRIT OF ERROR.

An order overruling a motion to set aside a verdict of a jury and refusing to grant a new trial is not such an order or judgment as will authorize a writ of error to this Court.

2. WRIT OF ERROR—FINAL JUDGMENT.

In order to authorize a writ of error there must be a final judgment on the verdict.

Z. T. Vinson for plaintiff in error.

H. K. Shumate for defendant in error.

ENGLISH, JUDGE:

This was a writ of error allowed from an order of the Cir-

*On account of illness.

cuit Court of Wayne county entered on the 6th day of June, 1885, overruling a motion then made by the plaintiff to set aside the verdict of the jury therein rendered and award him a new trial. An examination of the record discloses the fact, that no judgment was ever rendered by said Circuit Court upon said verdict, and, there being no final judgment in the cause and no order, from which a writ of error would lie to this Court, the writ of error awarded to the plaintiff must be dismissed as having been prematurely allowed, with costs against the plaintiff in error.

DISMISSED.

CHARLESTON.

COHN v. WARD.

*(GREEN JUDGE, Absent.)

Submitted January 10, 1889.—Decided January 29, 1889.

1. FRAUDULENT CONVEYANCE—CONSIDERATION—DEED.

It is the settled law of this State, that the recital in a deed of the payment of a valuable consideration for the property therein conveyed is not evidence of such payment as against a stranger or a creditor of the grantor assailing the deed as voluntary and fraudulent as to him. (p. 38.)

2. FRAUDULENT CONVEYANCE—CONSIDERATION—BURDEN OF PROOF.

But when in such case the conveyance is shown to be founded upon a valuable consideration, the burden of proving that the deed is fraudulent in fact rests upon the creditor assailing it. (p. 38.)

3. FRAUDULENT CONVEYANCE—TRUSTS AND TRUSTEES.

A trust-deed conveying real and personal property including a stock of store-goods is not *per se* fraudulent, because it postpones the sale of real estate for six months from the date of the deed and authorizes the trustee after taking an inventory of the store-goods to take control of them and sell the same at private sale, if that can be done in six months, and then sell the residue at public auction, in either case the sales to be in the best possible manner for the interests of the creditors of the grantor. (p. 39.)

4. FRAUDULENT CONVEYANCE—TRUSTS AND TRUSTEES.

Where a trust-deed secures many debts in separate classes or

*On account of illness.

39	34
39	101
39	514
39	34
36	250
36	521

33	34
45	606

32	34
48	688

32	34
53	62
32	34
55	502

to different persons, the simple fact, that a part of the debts secured are shown to be invalid or voluntary, will not make the deed invalid as a security for other and *bona fide* debts secured therein. (p. 40.)

5. FRAUDULENT CONVEYANCE—TRUSTS AND TRUSTEES—INSOLVENCY.

The fact, that a trustee in a trust-deed is insolvent and untrustworthy, will not of itself make the deed void; but in such case the court may appoint a receiver and administer the trust according to the provisions of the deed. (p. 40.)

W. A. McCorkle for appellant.

J. G. Schilling for appellees.

SNYDER, PRESIDENT :

James T. Ward and Martha A., his wife, by three several deeds dated in October, 1883, and recorded in September, 1884, conveyed to J. C. Dillard with general warranty the following real estate situate in Roane county, viz: (1) A house and lot in the town of Walton, in and upon which the said Ward and wife then resided; (2) the storehouse and lot in the same town then occupied by the said Ward; and (3) a lot of land on the south side of Poca river, near said town. By three subsequent deeds dated November 19, 1883, and recorded on September 26, 1884, the said J. C. Dillard and wife conveyed all of said real estate to Martha A. Ward, the wife of said James T.; and afterwards the said James T. Ward and Martha A., his wife, by deed dated January 31, 1885, duly acknowledged by them and recorded February 3, 1885, conveyed to Uriah Dobbins, trustee, all the aforesaid real estate together with all the other real and personal property owned by the grantors, the personalty consisting of (1) a stock of dry goods, boots and shoes, queen's-ware and hardware and clothing and all the fixtures and appurtenances in the storehouse then occupied by said Ward in the town of Walton; (2) all the household and kitchen furniture in the dwelling-house of said Ward in the said town of Walton; (3) the cattle, horses and other live-stock of the said Ward; and (4) all the notes, accounts and other evidences of credits belonging to said Ward,—in trust for the following purpose:

“ The said trustee to take charge of the above-mentioned property, to appraise and take an inventory of the same, and

take control of the store-room and the goods therein, and sell the goods in the best possible manner for the creditors of the said J. T. Ward, at private sale, for the space of six months, and at the end of said six months, in case said personal property and store goods are not sold at private sale, then the said trustee shall, after advertising for the space of thirty days, sell the said personal property at public auction. The said trustee shall also sell the said real estate, if after the space of six months thereof it shall be ascertained that the personal estate shall not pay all of the indebtedness due and owing by said Ward in the following manner, and upon the following terms: Notice shall be given of the terms of said sale by publishing in some newspaper published in Roane county. The payment shall be one-third cash in hand, and the balance in twelve and twenty-four months, respectively, in equal installments, the purchaser executing bonds for the purchase-money, with approved security, and title withheld until whole of purchase-money is paid; and that the proceeds of the sale of the said above-mentioned real and personal property shall be paid by said trustee to the following persons, and in the following order, and for the following purposes, to-wit: *First*, to pay the costs of the execution of said trust; *second*, J. C. Dillard the sum of one thousand dollars; *third*, James S. Gandee the sum of one thousand dollars; *fourth*, Jasper Peterson, of Lewis county, the sum of eight hundred and thirty-five dollars; *fifth*, Clayburn Cunningham the sum of seven hundred and fifty dollars; *sixth*, F. J. Daniels & Co. the sum of two hundred and fifty dollars; *seventh*, G. R. Jacobs the sum of thirty dollars; *eighth*, A. B. Wells the sum of fifty dollars; and after the above sums shall be paid in the order set out in the above manner, then the trustee shall pay the following debts *pro rata* with each other: McFarland, Sanford & Co., \$280.00; Reed & Peebles, \$150.00; Cohn Bros., about \$300.00; Goodrich, Peele & Co., \$150.00; and any other indebtedness not herein expressly mentioned shall be paid *pro rata* with the above last-named parties. And it is further understood that in case any of the sums above mentioned shall be ascertained to be incorrect, that the said trustee shall correct the same, and pay the same according to said corrections, and the parties

of the first part warrant generally the property herein conveyed."

On February 14, 1885, Cohn Bros. & Co., suing for themselves and other creditors of said James T. Ward, filed their bill in the Circuit Court of Roane county against the said Ward and wife, the trustee and creditors mentioned in said trust deed, in which they allege, that the said James T. Ward is indebted to them, the plaintiffs, in the sum of \$377.72, being the balance on two notes of the said Ward, and on which an action of debt had been instituted in said court on January 5, 1885. Then after alleging the indebtedness of said Ward to several other creditors and setting out the conveyances before mentioned the bill charges, that the aforesaid deeds from Ward and wife to J. C. Dillard and from Dillard to Martha A. Ward were voluntary and made with intent to delay and defraud the creditors of said Ward; that the said trust-deed from Ward and wife to Uriah Dobbins, trustee, "is fraudulent and void, because the sale of the real estate therein mentioned is postponed for six months, and because the said deed provides for the voluntary distribution of the proceeds of the sale of the property to the amount of \$——, to Dillard, Gandee, Peterson, Cunningham, Daniels, Jacobs and Wells, and out of the residue, if any, it provides for the payment of the debts *pro rata* of said Ward; and for other reasons appearing on the face of said deed."

The bill further alleges, that the trustee, Dobbins, was a confidential friend of Ward and under his influence; that he was selected as trustee, because said Ward knew he could induce him to allow the trust-property to be used and converted to the benefit of Ward; and that Dobbins was wholly insolvent and irresponsible and was made trustee on this account; and further that Ward and wife did not surrender the possession of the trust-property, but retained the same and are still in possession thereof. The prayer is that all of said deeds may be declared fraudulent and be set aside, and that the property therein conveyed may be subjected to the debts of Ward; that the trustee, Dobbins, may be enjoined from interfering with said property; and that a receiver may be appointed to take charge of the same, *etc.*

The defendants, James T. Ward and the trustee, Dobbins,

the only parties who answered the bill, each deny all the allegations charging fraud or imputing bad faith or any illegal purpose in the execution of said deeds or either of them; and they aver that the same were executed *bona fide* and for legitimate purposes.

To these answers there were general replications, but no depositions were filed or other proof offered to sustain the facts charged in the bill or the averments of the answers except the exhibits filed by the plaintiffs to prove the indebtedness of Ward to them and other creditors.

The cause was heard on September 3, 1887, and a decree entered setting aside all the aforesaid deeds including the trust-deed from Ward and wife to Dobbins as to the plaintiffs and other creditors of Ward; and by the same decree the cause was referred to a commissioner to take an account of the debts and assets of the said Ward; and a receiver was appointed to take charge of the real and personal property of Ward. From this decree the defendant James T. Ward has appealed.

It seems to me, this decree is plainly erroneous. It is the settled law of this state, that the recital in a deed of the payment of the consideration for the conveyance is not evidence as against a stranger or a creditor of the grantor assailing it as voluntary and therefore fraudulent as to him. In such case the burden of proving, that the deed was made for a valuable consideration, rests upon the grantee or persons claiming the benefit of the deed. But when the consideration is admitted or properly established by proof, then the burden of proving, that the deed is fraudulent in fact, is upon the creditor, who assails the deed. *Rogers v. Verlander*, 30 W. Va. 619, (5 S. E. Rep. 847); *Knight v. Capito*, 23 W. Va. 639.

According to these authorities, if the bill in this cause had alleged, that the debt of the plaintiffs was in existence in 1883, at the time the deeds from Ward and wife to Dillard and from Dillard to Mrs. Ward were executed, and that said deeds affected the rights of the plaintiffs, then in the absence of any evidence other than the recitals in the deeds, that they were made for a valuable consideration, the court would have been bound to set them aside as voluntary and inoper-

ative against the debts of the plaintiffs and other creditors of the grantors. But the bill in this cause does not allege, that Ward was indebted to the plaintiffs, at the time said deeds were executed; and therefore they had no right to complain of said conveyances on the mere ground that they were voluntary. In addition to this, it appears that by the trust-deed of January 31, 1885, Mrs. Ward and her husband conveyed all these lands to Dobbins for the benefit of all the creditors of Ward including the plaintiffs. It does not therefore appear, that the said conveyances of 1883 do or can in any manner prejudice the rights of the plaintiffs, whether they are valid or invalid, unless the trust-deed is also held invalid.

The material question then is, whether or not the said trust-deed is valid. There is no proof, that this deed is fraudulent in fact. The burden of showing this is, as we have seen, upon the plaintiffs, and they have failed to show it. But the plaintiffs contend, that this deed is fraudulent and void on its face; and this contention is based upon two grounds: *first*, because the sale of the real estate is postponed for six months. There is certainly nothing in this ground. *Lewis v. Caperton*, 8 Gratt. 148; *Dance v. Seaman*, 11 Gratt. 778; *Sipe v. Earman*, 26 Gratt. 563. Nor does it make the deed fraudulent *per se*, that the trustee is authorized to sell the store-goods at private sale for a period of six months, as this Court has expressly decided in *Kyle v. Harveys*, 25 W. Va. 716. *Second*. It is claimed that, said trust-deed is fraudulent, because it "provides for the voluntary distribution of the proceeds of the sale" to a specified amount to certain named creditors; and because the trustee is insolvent, irresponsible and the mere tool or instrument of Ward selected for the purpose of defrauding the creditors of Ward. If by the phrase "voluntary distribution of the proceeds of the sale" it is intended to assert, that the amounts secured to the creditors named in the deed are voluntary and without valuable consideration, then the burden of proving, that these alleged debts thus assailed by the plaintiffs were valid and based upon a valuable consideration, was upon the said secured creditors; and, as they failed to offer any proof of that fact, it was proper to hold said debts invalid as against

the plaintiffs and the other creditors of Ward ; but that would not of itself make the deed fraudulent as to the other creditors secured in it, who had valid and *bona fide* debts, which are not questioned or assailed by the plaintiffs in their bill or otherwise, unless the deed was shown to be fraudulent in fact.

Where a trust-deed secures numerous debts in different classes or to different persons, the simple fact, that a part of the debts thus secured are shown to be voluntary or even fraudulent, will not make the deed invalid as a security for other debts mentioned or secured therein, which appear to be *bona fide* and founded upon a valuable consideration. *Klee v. Reitzenberger*, 23 W. Va. 749; *Bank v. Arthur*, 3 Gratt. 173.

In regard to the insolvency of the trustee and the fraudulent purpose of the grantors in selecting him as such it is enough to say, that these are matters *dehors* the face of the deed, and there is no proof of their truth. But, even if these charges had been proven, in the absence of any evidence to show, that the *bona fide* creditors secured in the deed had actual notice of its fraudulent purpose, the deed would not be void as to them. The appointment of an insolvent or untrustworthy trustee will not of itself render a trust deed void. In such case the court of equity may upon a proper showing take charge of the trust-property and put it into the hands of a receiver and thus administer the trust according to the provisions of the deed. *Harden v. Wagner*, 22 W. Va. 356. If the charges against the trustee, as made in the bill, are established by proof, then the plaintiffs' bill should be sustained, and a receiver should be appointed to take charge of the property conveyed in the trust-deed, and the same should be administered by the court according to the terms of the deed, so far as it secures *bona fide* debts founded upon a valuable consideration, unless the deed is proven to be fraudulent in fact with notice to the trustee of its fraudulent purpose. In this latter event the property of the defendant, Ward, should be made liable for his debts regardless of the trust-deed or its provisions.

For the reasons before stated the decree of the Circuit Court must be reversed, and the cause remanded for further

proceedings in accordance with the principles announced in this opinion.

REVERSED. REMANDED.

CHARLESTON.

McKINSEY v. SQUIRES.

*(BRANNON, JUDGE, absent.)

Submitted January 17, 1889.—Decided February 5, 1889.

1. CONSTITUTIONAL LAW—ATTACHMENT.

Our statute, (Code 1887, c. 106, s. 1,) which provides, that an attachment may be sued out in equity for the recovery of damages for a wrong, is constitutional. (p. 43.)

2. EQUITY—BREACH OF PROMISE OF MARRIAGE—DAMAGES.

A suit in equity may under the provisions of said statute be maintained to recover damages for the breach of a marriage contract. (p. 43.)

3. BREACH OF PROMISE OF MARRIAGE—SEDUCTION—EVIDENCE.

Where seduction has been practiced under color of a promise to marry, it is proper to prove, in an action for the breach of such promise, the seduction in aggravation of the damages. (p. 45)

4. ATTACHMENT—SERVICE OF ORDER—ABSENT DEFENDANT.

In an attachment-suit in equity, to which the debtors of a non-resident defendant are made parties and charged to be such debtors, it is not error to decree, that the latter shall pay the amount found to be due from them to the non-resident, simply because the order of attachment had not been served upon them. (p. 45.)

J. Brannon and *C. C. Higginbotham* for appellants.

Haymond & Byrne for appellee.

SNYDER, PRESIDENT:

This is a foreign attachment-suit in equity, commenced July 3, 1885, in the Circuit Court of Braxton county by Mattie E. McKinsey to recover damages from the defendant, Olen B. Squires, for breach of marriage-contract and seduction of the plaintiff by said defendant. The original bill alleged the

*Presided in the Court below.

89	41
88	986
89	41
34	942
32	41
45	488
32	41
47	224
47	625
47	626

contract, its breach, the seduction resulting in the birth of a child; that said defendant had fraudulently disposed of all his estate in Braxton county, consisting of a retail store and other property, to his father, who was a participant in the fraud and held said property in trust for said defendant; and that the said Olen B. Squires had left the State and was a non-resident. The only defendants to this bill were the said Olen B. Squires and his father, D. S. Squires. On the day the suit was brought, the plaintiff sued out an attachment for \$5,000.00 against the estate of the defendant, Olen B. Squires, which was by the sheriff of said county levied upon the goods in said store, and garnishee process was served upon the defendant, D. S. Squires.

In August, 1886, the plaintiff filed her amended bill making Abe Carper, Levi Leonard, D. D. T. Farnsworth, G. A. Newlon and G. F. Stockart parties, and charging that the defendant Olen B. Squires had a bond on the said Newlon and others for \$5,000.00, which, at the time he left this State, he placed in the hands of said Abe Carper, who had collected \$300.00 thereon and held the same as the money of Olen B. Squires; that afterwards said bond purported to be assigned to one B. F. Carper and then surrendered, that a new bond was executed in consideration thereof to said B. F. Carper by the defendants, Farnsworth, Leonard, Newlon and Stockart, for \$5,300.00, that being the amount of the original bond and one year's accrued interest on same; that both said alleged assignment and the execution of said new bond were simply devices to defraud the plaintiff, and that the obligors in said last-named bond still owed the amount thereof to the said Olen B. Squires; and that the obligors as well as the obligee in said bond had notice of said fraud, and abetted therein.

After depositions had been taken by both sides, and the case had been matured for hearing, the defendant, Olen B. Squires, who had been proceeded against by order of publication, appeared in court and on April 30, 1887, filed his answer to the plaintiff's bill, to which she replied generally; and on the same day the cause was heard on the merits, and a personal decree entered in favor of the plaintiff against the defendant, Olen B. Squires, for \$1,000.00 and against

the other defendants as garnishees or debtors of the said Olen B. Squires as follows: Against D. S. Squires, \$500.00; against Abe Carper, \$300.00; and against the defendants, Farnsworth, Leopard, Newlon and Stockart jointly, \$1,000.00 with a proviso, that the payments by all the said defendants should not exceed the sum of \$1,000.00 and the costs of suit. From this decree all the defendants have appealed.

It is earnestly contended for the appellants, that, as the cause of action alleged in the bill is for unliquidated damages for a personal injury, a court of equity has no jurisdiction. This contention, it seems to me, is fully answered by our statute, which declares in express terms, that the action or suit may be "for the recovery of any claim or debt arising out of contract or to recover damages for any wrong," and then provides, that "such attachment may be sued out in a court of equity for a debt or claim legal or equitable." Code 1887, c. 106, s. 1. It is unquestionably true, that this statute must be construed strictly; but its language is so direct and positive, that it does not admit of construction. It authorizes a suit by attachment in equity to recover damages for any wrong. But it is claimed that the statute is in violation of our constitution, Art. III, s. 13, which declares: "In suits at common law, * * * the right of trial by jury, if required by either party, shall be preserved." It is enough to say, in reply to this claim, that this is not a suit at common law but a suit in equity. But assuming that the legislature has not the power to deprive a party of the right of trial by jury by simply changing the form of action and giving a court of equity jurisdiction over a purely legal demand, the question still remains: Does this statute necessarily deprive a party of a trial by jury? We have a statute which provides for a trial by jury in any chancery case, when there is a conflict of evidence "or an inquiry of damages." Code 1887, c. 181, ss. 4, 5. In this case, therefore, the appellants, or either of them, if they had required it, could have had a trial by jury; but none of them asked for such trial. I do not think, therefore, that the aforesaid statute is unconstitutional.

It is further contended for the appellants, that the Circuit

Court erred in not sustaining the defence of the statute of limitations. The evidence of the plaintiff tends to prove, that the marriage-contract was entered into on New Year's eve, 1881; that the seduction was in May, 1882, or prior thereto; and that the child was born in February, 1883; and also that the contract of marriage was not broken until some time after February, 1884, the time the defendant, Olen B. Squires, left the State and became a non-resident thereof. It is true, the said defendant denies, that there was ever any contract of marriage, or that he seduced the plaintiff or ever had sexual connection with her. This suit was brought July, 1885, and, as the time, during which the defendant was out of the State, must be excluded, it seems to me, the cause of action was not barred, at the time the suit was commenced. If the defence of the statute of limitations is sustained upon the evidence of the defendant, Olen B. Squires, it is wholly immaterial, because the evidence offered by him in support of that defence is simply a denial, that the plaintiff ever had any cause of action. As to this latter the testimony is conflicting.

The plaintiff testifies positively, that there was a contract of marriage and consequent seduction; while the defendant Olen B. Squires with equal positiveness denies, that there ever was such a contract, or that he at any time cohabited with the plaintiff. To say the least of this contradictory testimony, it is fully proven, that the plaintiff was in February, 1883, delivered of a child; and the letters written by said defendant to the plaintiff during her pregnancy tend strongly to show, that he was or believed himself to be the father of the child; and there is other evidence, which in some degree corroborates the testimony of the plaintiff and flatly contradicts that of the said defendant, thus rendering his testimony less credible than that of the plaintiff. Be this however, as it may, the Circuit Court having decided, that there was a marriage-contract, and this decision being founded on depositions, which are so conflicting and unsatisfactory, that it is at most conjectural, as to which side should prevail, this Court will according to its repeated decisions decline to disturb the finding of the Circuit Court. *Smith v. Yoke*, 27 W. Va. 639; *Doonan v. Glynn*, 28 W. Va. 715.

It is further insisted, that the plaintiff's bill should have been dismissed, because she improperly sued for breach of marriage-contract and for seduction. I do not understand this to be the character of the bill. The seduction is not alleged as a cause of action but simply as an aggravation of damages. The law is well settled, that, when seduction has been practiced under color of a promise to marry, in an action or suit for the breach of such promise it is proper to aver and prove the seduction in aggravation of the damages. *Sherman v. Rawson*, 102 Mass. 395; *Sauer v. Schulenberg*, 33 Md. 288; *Wells v. Padgett*, 8 Barb. 323; *Kniffen v. McConnell*, 30 N. Y. 285.

It is further insisted, that the defendant, Olen B. Squires, was improperly refused a continuance. He had been proceeded against as a non-resident, but after depositions had been taken on both sides including that of said Squires, and the cause had been regularly matured and set for hearing, he appeared and filed his answer, in which he avers, that he has recently discovered some very material evidence in his behalf bearing upon said pretended contract of marriage, and that in right and justice he is entitled to a continuance of the cause until the next term of the court. But he does not set out any sufficient excuse for not having discovered and taken said testimony, nor does he say, by whom he expects to prove it, or what it is. The fatal defect in this assignment of error however is, that neither the decree nor any order in the record shows, that he ever asked for a continuance of the cause. This is a sufficient reason for his not getting one. It is therefore unnecessary in this cause to consider, whether or not, if he had moved the court for a continuance under the circumstances disclosed by the record, it would have been error to refuse it.

The only other assignment of error, which is of sufficient importance to require notice, is, that the court erred in pronouncing any decree against the appellants other than Olen B. Squires and D. S. Squires, because no order of attachment was ever sued out or served upon them. In the answer filed by Olen B. Squires he admits, that the bond of \$5,300.00 executed to B. F. Carper by the appellants, Farnsworth, Leonard, Newlon and Stockart had been assigned to him by said

Carper; that it was in his possession, and that the money due thereon from said appellants was due to him. The said appellants were all parties to the suit; and the decree directed, that upon the payment of the amount decreed against them they should have credit therefor upon said bond. It was not necessary in a cause such as this to serve the order of attachment upon said appellants, they being parties to the bill and having appeared and having answered as such. The decree is certainly not to their prejudice, as there is no pretence, that they do not owe the money they are ordered to pay; and as to the appellant, Abe Carper, the decree against him being based upon a conflict of testimony and the finding of the Circuit Court, this Court will decline to disturb it.

Upon the whole record I am of opinion, that there is no error, for which this Court can reverse the decree of the Circuit Court; and it must therefore be affirmed.

AFFIRMED.

CHARLESTON

MILLER v. NAVIGATION Co.

Submitted January 22, 1889.—Decided February 5, 1889.

JURISDICTION—SUPREME COURT OF APPEALS.

In an action of *assumpsit* by a private corporation, authorized by its charter to levy tolls upon persons using a river, which had been improved by it, against the defendant for tolls, the defendant pleaded *non assumpsit*, and there is a judgment for the plaintiff for less than \$100.00. Upon a writ of error by the defendant, *held*, this court has no jurisdiction to review the judgment of the Circuit Court, although the record shows that the real defence to the action was, that the condition of the river was such, that the plaintiff had no right to levy the toll, for which the judgment was recovered.

Loomis & Tavenner and *O. Johnson* for plaintiff in error.

J. A. Hutchinson and *J. B. Jackson* for defendant in error.

SNYDER, PRESIDENT :

Writ of error to a judgment of the Circuit Court of Wood

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38	842
32	46
41	751
32	46
48	890
32	46
61	471

county rendered on December 24, 1887, in an action theretofore commenced by the Little Kanawha Navigation Company against D. M. Miller before a justice of said county. The claim of the plaintiff was for tolls on twenty two log-rafts, \$66.00 and for penalty (double tolls,) \$66.00 making together, \$132.00. The justice gave the plaintiff judgment for \$122.00; and the defendant, Miller, appealed to the Circuit Court, where the case was tried upon the issue of *non assumpsit* before a jury, which found a verdict in favor of the plaintiff for \$66.00, for which sum the court after overruling the motion of the defendant to set aside the verdict entered judgment; and it is to this judgment that the defendant, Miller, obtained this writ of error.

The first question presented is: Has this court jurisdiction of the case? The defendant in error, the Little Kanawha Navigation Company, is a domestic corporation. It was first incorporated by statute in 1863 and was authorized to improve the navigation of the Little Kanawha and Hughes rivers by locks and dams, sluices, canals or other usual modes of improvement, commencing at or near the mouth of the Little Kanawha river, and extending up the same and Hughes river so far, as may be deemed practicable, with power to condemn lands and to "charge and receive such tolls for the use of their [its] improvement as may be fixed by the Board of Public Works or by law." By an act passed March 4, 1868, the legislature amended the charter of the company and therein prescribed specific tolls to be charged by the company, and among others fixed the rate of "toll on timber and logs at two cents per hundred cubic feet per mile."

The facts certified in this case show, that said company accepted the said charter and improved both of the aforesaid rivers; that it had constructed several locks and dams on the Little Kanawha below the mouth of Hughes river, one at Leachtown, thirteen miles from the mouth of the Little Kanawha river, and another at Shacktown, four miles from the mouth of said river; that these locks and dams were during the whole month of February, 1887, in good order and condition; that about the 17th day of February, 1887, the defendant, Miller, passed twenty two rafts of logs from a point about one mile

above the mouth of Hughes river over said two dams; that the toll on said rafts at the rate the company is authorized to charge was \$66.00 and that this sum was demanded of the defendant, and he refused to pay the same or to pay any toll whatever on said rafts; that at the time said rafts were passed over said dams, the back-water from the Ohio river was over the dam at Leachtown, and the lock at that place as well as the one at Shacktown was entirely under water; and that not only rafts but steam-boats passed over the dams on that day without touching either locks or dams.

The counsel for Miller, in their brief, say: "The question involved is not whether these tolls or lockages were excessive, but whether, at the time they were demanded and *quoad* this transaction, the plaintiff had the right to levy any tolls whatever." This is a correct statement of the only plea or ground of defence made by the defendant in this case. He concedes, that, if he is not legally entitled to use the river without the payment of tolls, when by reason of the high water in the river he can pass over the dams without using the locks, then he is liable for the tolls, which the plaintiff has charged him, and that the judgment of the Circuit Court must be affirmed.

But on the other hand the counsel for the plaintiff contend, that the question presented is not, whether the plaintiff had the legal right to levy tolls, but whether the defendant owed the amount recovered by the plaintiff in this case, and that, the amount recovered being less than \$100.00, this Court has no jurisdiction to review the judgment of the Circuit Court.

The third section of article VIII of our constitution declares, that the Supreme Court of Appeals "shall have appellate jurisdiction in civil cases, (1) where the matter in controversy exclusive of costs is of greater value or amount than \$100.00; (2) in controversies concerning the title or boundaries of land, the probate of wills, the appointment or qualification of a personal representative, guardian, committee or curator; (3) or concerning a mill, road, way, ferry or landing; (4) or the right of a corporation or county to levy tolls or taxes; and (5) also in cases of *quo warranto*, *habeas corpus*" etc. Our statute carrying into effect these provisions is substantially the same as the constitution. Code, c. 135, s. 1.

As the amount in controversy in this case is less than

\$100.00, it is plain, that the jurisdiction of this court, if it exists at all, is conferred by that one of the above provisions, which declares, that it shall have jurisdiction "in controversies concerning the right of a corporation or county to levy tolls or taxes." In order to show that this provision does not confer jurisdiction, the counsel for the defendant in error rely on the following cases: *Hutchinson v. Kellam*, 3 Munf. 202; *Skipwith v. Young*, 5 Munf. 276; *Hancock v. Railroad Co.*, 3 Gratt. 328; *Clark v. Brown*, 8 Gratt. 549; *Umbarger v. Watts*, 25 Gratt. 167.

The act of 1792 defining the jurisdiction of the Supreme Court of Appeals of Virginia, under which the first two of the above-cited cases were decided, provided, that said Court should have jurisdiction, where "the matter in controversy should be equal in value exclusive of costs to \$100.00 or be a freehold or franchise." Under this statute it was decided in *Hutchinson v. Kellam*, 3 Munf. 202, that, "to give the court of appeals jurisdiction, on the ground that the matter in controversy is a freehold or franchise, the right to the freehold or franchise must be directly the subject of the action not incidentally or collaterally." This was an action of trespass *quare clausum fregit*, and the record showed, that the title or bounds of land was drawn in question, but, as the damages recovered were less than \$100.00, the jurisdiction was denied. CABELL, J., in his opinion says: "To give this court jurisdiction, the matter in controversy must be equal in value to \$100.00, or must be a freehold or franchise. The action of trespass is one in which damages only are recovered, and, although the title or bounds of land may be incidentally and collaterally brought in question, yet the value of the matter in controversy is, from the very nature of the action, the value of the damages sustained by the trespass; and this, as well where the title or bounds of land may be drawn in question as where they may in no manner be involved in the dispute." This view of the case was concurred in by Judges ROANE and FLEMING.

The case of *Skipwith v. Young*, *supra*, was an action on the case for injury to the plaintiff's family and to his adjoining land occasioned by the erection of a mill and dam by the defendant. It plainly appeared from the pleading in the case,

that the right of the defendant to erect the mill was drawn in question, but, the damages recovered being less than \$100.00, it was held, that the court of appeals had no jurisdiction, although the statute in express terms gave such jurisdiction in cases, where the matter in controversy was a freehold or franchise, regardless of the amount or value in controversy. BROOKE, J., in his opinion after reviewing and affirming the principles and decision of the court in *Hutchinson v. Kellam* says: "The matter in controversy is that for which the suit is brought, and not that which may or may not come in question. In the case relied on in 3 East 346, [*Outram v. Morewood*,] Lord ELLENBOROUGH says, the judgment is the fruit of the action and can only follow the particular right claimed and injury complained of. The injury in the case before the court, I think, is emphatically the matter in controversy, though other matters may have been put in issue, the finding of which by the jury may, if pleaded, estop the party in another action." 5 Munf. 286. And then, adverting to the consequences of so construing the statute as to extend the appellate jurisdiction to cases, in which matters were not directly in controversy, but which may have been indirectly drawn in question, the same judge says: "If this court is to take jurisdiction by consequence,—that is, if an appeal will lie here from the indirect decisions of the inferior courts, in which matters may have come in question though not in controversy between the parties according to the foregoing exposition of that expression, few cases will escape the jurisdiction of this court." The decision of the court sustained these views of Judge BROOKE.

In 1819, after the two foregoing decisions had been rendered, the statute was amended by authorizing appeals as of right in controversies concerning roads, mills *etc.*, and yet after this change in the statute the court in *Hancock v. Railroad Co.*, 3 Gratt. 328, decided, that "appeals as of right from orders of the County Court in controversies concerning roads only exist, where the controversy is concerning the establishment of a road, and not where it is a collateral controversy concerning the damages occasioned by a road already established." And subsequently in 1852 the court in *Clark v. Brown*, *supra*, decided that, "in an action on the

case for an injury done to plaintiff's land by the mill-dam of the defendant, though the freehold or franchise was drawn in question, yet, if the damages found by the jury are under \$200.00, the court of appeals has no jurisdiction of the case." The constitution of Virginia adopted in 1869 provides, that the "Supreme Court shall not have jurisdiction in civil cases, where the matter in controversy exclusive of costs is less in value or amount than \$500.00 except in controversies concerning the title or boundaries of land, the probate of a will, * * * or concerning a mill, roadway, ferry or landing or the right of a corporation or of a county to levy tolls or taxes," etc. It is plain that the language here employed excepts from the limitation of \$500.00 and allows appeals without regard to the amount in controversy in all controversies concerning the title or boundaries of land and the other excepted controversies mentioned in said provision of the constitution; and yet in the case of *Umbarger v. Watts*, 25 Gratt. 167, decided in 1874 under said constitutional provision the court reviews all the Virginia cases hereinbefore mentioned and in effect decides, that the law as announced in those cases is still the law of that State notwithstanding the aforesaid constitutional provision. In concluding the opinion of the court in that case, CHRISTIAN, J., says: "In support of these views as to the true construction of the constitution, it may be further observed that not only have the words 'matters in controversy' received a judicial exposition, but also the word 'concerning,' as used in the constitution;" citing *Hancock v. Railroad Co.*, *supra*.

In *Neal v. Com.*, 21 Gratt. 511, the town of Danville assessed Neal with a double tax for failing to take out a license as a commission-merchant, and he applied to the corporation-court of that town to be relieved from said tax, on the ground that he was not bound to take out such license. The amount of the tax was less than \$500.00, and said court refused to relieve Neal from the tax. On appeal the Supreme Court held, that the appeal did not lie, and dismissed it, because the amount in controversy was less than \$500.00. In delivering the opinion of the court MONCURE, P. after deciding, that it was a civil and not a criminal case, proceeds to

quote the provisions of sec. 2, art. VI, of the constitution of that state, which among other matters gives the court of appeals jurisdiction, just as our constitution does, in controversies "concerning the right of a corporation or of a county to levy tolls or taxes," and then says: "Certainly none of these exceptions" [that is, these special provisions] "apply to these cases;" and with this remark he dismisses the discussion, thus declaring that it is too plain for argument, that the constitutional provision "concerning the right of a corporation or of a county to levy tolls or taxes." does not confer jurisdiction in such cases. 21 Gratt. 515.

This Court, in *Greathouse v. Sapp*, 26 W. Va. 87, after reviewing and approving the aforesaid cases of *Hutchinson v. Kellam* and *Skipwith v. Young*, as well as referring to many other cases, held: "If in an action of trespass *quare clausum frequit* the damages recovered be less than \$100.00, the defendant can not obtain a writ of error from this Court, though it appears from the record, that the title or boundaries of the land were drawn in question." This case, it seems to me, decides the question before us. The provision, under which the jurisdiction was claimed in that case, is that the court shall have jurisdiction in controversies "concerning the title of boundaries of land." If the mere fact, that the title to land was drawn in question in the case, did not confer jurisdiction, as we decided in that case, it inevitably follows, that the mere fact, that the right of a corporation to levy tolls is drawn in question in the case at bar, will not confer jurisdiction.

There are two provisions of the constitution affecting these cases; that is, the language applicable to the one case is, "concerning the title or boundaries of land," and to the other, "concerning the right of a corporation or of a county to levy tolls or taxes." The word "concerning" is used in each class and must therefore have the same effect in both. If it requires a direct proceeding in the one instance to confer jurisdiction, it must be equally direct in order to confer jurisdiction in the other; and it having been held both in this state and in decisions of the Supreme Court of Virginia, which are binding upon this Court, that in order to confer jurisdiction independently of the amount in controversy it is

not enough, that the title or boundaries of land is incidentally or collaterally drawn in question, but that the land must be the direct subject of the controversy, it follows in the case at bar, that it is not enough, that the right of the corporation to levy tolls is drawn in question, but the right to levy tolls by the corporation must be the direct subject of the controversy. In this case the right of the corporation to levy tolls is not questioned, but it is claimed, that this right does not authorize the levy of tolls under the particular facts as shown by the defendant in this case. The only matter in controversy is the amount of the tolls and not the right to levy tolls. It is true the right to levy tolls under the special facts shown by the record in this case is drawn in question incidentally and collaterally, but the direct purpose of the action is the recovery of a specified amount of money. As in the instance concerning the title or boundaries of land the action must be for the land as in an action of ejectment, so in this instance the action must be against the right to levy tolls in any case and not merely a denial of the right in the particular case or under the special circumstances.

For these reasons, and in accordance with authorities before referred to I am of opinion, that this Court has no jurisdiction to review the judgment of the Circuit Court in this case.

Having decided this question upon the constitutional and statutory provisions of this State as construed by our own Court and the Court of Appeals of Virginia in decisions, which are binding upon us, it is irrelevant to refer to the decisions of other states relied on by counsel for the plaintiff in error to sustain the jurisdiction of this Court, because, even if the statutes of those states are the same as our own, still the decisions made under them, if not in accord with our own, would not warrant us in departing from the construction given to our constitution and statutes by our own courts.

It is, however, insisted, that the only direct proceeding, by which the right of a corporation to levy tolls can be put in issue, is by *quo warranto*; and, as our constitution in terms gives this Court appellate jurisdiction in all cases of *quo warranto*, the provision of the constitution now in question, if the construction we have given it is sustained, would be wholly

useless and without effect. It is not necessary or proper to decide in this case, whether or not *quo warranto* is the only direct proceeding, by which the right of a corporation to levy tolls or taxes can be tested. The courts of this state have in cases of municipal corporations taken jurisdiction by injunction in equity to prevent the collection of taxes illegally assessed by such corporations, and that jurisdiction has been maintained by this Court in some cases, where the amount in controversy was less than \$100.00. *McClung v. Livesay*, 7 W. Va. 329; *Wells v. Board*, 20 W. Va. 156; *Christie v. Malden*, 23 W. Va. 667; *Williams v. County Court*, 26 W. Va. 488. These cases seem to hold, that this Court has jurisdiction to review the decrees of the Circuit Court concerning the right of a municipal or public corporation to levy taxes without regard to the amount in controversy. But in none of them was the question of jurisdiction, in the form it is raised in the case now before us, suggested or considered; so that they are not binding authority either for or against the jurisdiction in this case. I have been unable to find in our Reports or in Virginia any case, in which the appellate court took jurisdiction concerning the right of a private or business corporation like the one now in question to levy tolls, where the amount in controversy was less than \$100.00, and such right was not the direct matter in issue. But, as before stated, it is not necessary in this case to decide, whether or not *quo warranto* is the only proceeding, by which the right of a corporation to levy tolls can be directly assailed, or to decide whether or not the provision of our constitution authorizing this Court to review matters of controversy concerning the right of corporations to levy tolls or taxes is useless for any purpose; for, if we were driven to the alternative of so holding, that would not justify us in overruling the repeated decisions of the courts of this state and Virginia, made both before and since the adoption of said constitutional provision and thus settling the law, that in a case like the one before us this court has no jurisdiction. I regard the law of this State as too firmly settled by the authorities hereinbefore mentioned to be now disturbed or questioned; and for that reason as well as because of the inconvenience, that would result from a contrary decision, I am of opinion, that this Court

has no jurisdiction to review the judgment of the Circuit Court in this case, and that the writ of error must be dismissed.

DISMISSED.

CHARLESTON.

BIGGS v. HUNTINGTON.

Submitted January 11, 1889. Decided February 5, 1889.

1. MUNICIPAL CORPORATIONS—STREETS, SIDEWALKS, &C.

Our statute (Code 1887, c. 43, s. 53) imposes an absolute liability upon cities, villages and towns for injuries sustained by reason of the failure of municipal authorities to keep in repair the streets, sidewalks *etc.* within the corporate limits, provided its authorities have opened or controlled such street or sidewalk, where the injury was sustained, as a public street or sidewalk. (p. 61.)

2. MUNICIPAL CORPORATIONS—STREETS, SIDEWALKS, &C..

In an action against such city or town the plaintiff must therefore allege and prove, that the street or sidewalk, upon which the injury occurred, at the time and place, when the injury was sustained, was controlled and treated by the municipal authorities as a public street or sidewalk and opened as such. (p. 61.)

3. MUNICIPAL CORPORATIONS—STREETS, SIDEWALKS, &C.

This duty of a city or town in this State, to keep its streets, sidewalks, alleys *etc.* safe for foot-passengers and vehicles, is not met by keeping simply the bed of the highway or the surface of the sidewalk in proper condition; but such duty is violated, if a dangerous excavation or open well be permitted so close to the margin of the sidewalk or highway as to make the use of them as such dangerous. But if a traveller unnecessarily for his own convenience deviates designedly from the highway and in so doing meets with an accident off from the highway, the city cannot be responsible, no matter how near the highway the obstruction may be.

Statement of the case by GREEN, JUDGE:

This was a suit brought by William Biggs, Sr., against the city of Huntington before a justice of Cabell county in which the plaintiff claimed damages to the amount In his complaint the plaintiff claimed damages to the amount of \$200.00 for this: that the plaintiff's horse was killed on the 25th of September by falling into a hole or well on and

32	55
33	105
33	105
33	558
32	55
37	002
32	55
38	179

32	55
51	133

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54	516
32	55
57	292

32	55
64	134

32	55
66	397

adjacent to the public and common highway known as "Third Avenue" in the corporate limits of the city of Huntington. To this complaint the defendant, the city of Huntington, pleaded not guilty; and thereupon a jury of six were duly sworn to try this issue, who having heard the evidence and arguments of counsel retired to their room to consider their verdict and returned into court with the following verdict: "We, the jury, find for the plaintiff and assess his damages at \$107.50." And the defendant by its attorney moved the court to set aside the verdict and grant it a new trial, because the verdict was contrary to the law and the evidence, which motion was overruled by the justice, who signed the following bill of exceptions:

"Be it remembered, on the trial of this cause, after the jury was sworn to try the issue joined on the plea of not guilty, the plaintiff to maintain the issue on his part introduced a witness, A. J. Beardsley, who swore, that he was a resident of the said city, had been living there seven years, and was a practicing physician; and that on the night of the 25th of September, 1886, he was called to see a woman in what is called 'West Huntington,' in corporate limits of said city; and that the party, who came for him, said she was a city-patient, and that he was city physician, and that he got in his buggy at about 10 o'clock P. M., and drove down Third avenue opposite where the woman was sick, and some one standing in the front door of the house called to him and said that was the place; to come in. He then turned short off Third avenue, and drove across the sidewalk for the purpose of hitching horse and buggy to the fence on a lot by the side of the house that he saw, which was outside the line of the street; and that the lot was adjacent to the north side of the street, and the house on the lot was thirty feet from north line of street; and that he knew he was driving out towards the fence,—that he was leaving Third avenue; and that as he drove out of said avenue, his horse gave down in his shoulders but recovered, and then his hind feet went down in what he learned afterwards to be a well. Witness jumped out, and the young man who was in the buggy with him also, and they went to work to detach horse from buggy,

and as soon as he did so the horse fell down into the well, and was killed. The horse was worth \$200.00 and belonged to William Biggs, Sr.; that the well was open as far as he could see, and was about from eight to twelve inches north of the line of the sidewalk and street, and that he did not know of the well until he drove into it; that there was no obstruction upon the street or sidewalk near the well to prevent him from driving up or down or across said avenue and sidewalk; that at the point where he was leaving Third avenue he knew there was no street or road, but he knew persons sometimes drove that way; that he had often passed along the street and sidewalk opposite to the well before accident, but that he never saw well at any time; that none of the city officials told him to go to see the woman, but that he often went to see patients, as city-subjects without being directed by any of the city officials; that he did not know the name of the woman he was to see, but thought her name was Tomlin; that there was no fence between line of street and well; that there was no barrier, guard or light at well, and, as far as he saw, there was no covering over well at the time; and that the well was on a level with the ground around it.

"The plaintiff introduced one Lucien McGinnis, who swore, that at the time of the accident to the horse in question he lived in West Huntington, and that he saw the well before the accident some time but could not remember the date. The first time he saw it, it was open, and the next time it was covered; that the well was about twelve to eighteen inches out of the line of the sidewalk and street, and that the sidewalk on Third avenue was fifteen feet wide, but there was nothing but a dirt sidewalk; that gutter or drain between sidewalk and part of street traveled by horses or vehicles was about three feet wide and four to six inches deep.

"George Adams, introduced by plaintiff, swore, that before the accident to horse he had often seen the well; that he had spoken to Mr. Taylor, who was agent of the owner of the property, to have it covered; that the well was outside of the line of the street and was ten to twelve inches outside of the line marked off for a sidewalk, but there was no pavement, plank, stone or brick or curbing to indicate sidewalk, and

that vehicles sometimes drove out on either side of well into the lot; and that the well was about thirty or forty feet from the middle of the street usually traveled by horses and vehicles; and that all the ground including the street and the space around the well was level except the depression, which caused the dirt gutter; that he was away at the time of the accident; that the gutter or drain between sidewalk and street for vehicles was about three feet wide and four to six inches deep; that on the south side and opposite to well, where accident occurred, the sidewalk was plank and used by pedestrians.

"Henry Putoff, on the part of the plaintiff, swore, that he lived near place, where horse was killed, and that he was there the night the horse fell into well; and before that time the well was sometimes covered and sometimes not; and that he had notified T. W. Taylor, agent for the property, that the well should be covered or filled up; that the well was about middle way in the opening; that Beardsley told him that he started to drive out into the lot, when the horse went into the well; that there was a tree standing about twenty feet from where Beardsley crossed the sidewalk, where he could have hitched; that the city-lamp was burning about sixty feet away from the well; that he had notified T. W. Taylor, agent for the property, that the well should be covered or filled up, before the accident occurred; that the morning after the accident T. W. Taylor had the well filled up.

"Florence Webb, for plaintiff, swore, that, at the time the horse fell into the well, she was well acquainted with the locality living close by, and that the well was often uncovered, and that she had frequently kept some small children from falling into it; that a day or two before horse went into well she saw it, and that it was entirely uncovered; that she had never noticed any light or barrier there to keep persons from falling into it, and that she had frequently seen huckster wagons drive on to the sidewalk near the well. And the above was all the evidence introduced on the part of the plaintiff, and he here rested.

"The defendant then by its attorneys moved the court to strike out all of the evidence from before the jury, because

the same was insufficient to sustain any verdict for the plaintiff. The court overruled the motion of the defendant and refused to strike out the evidence; to which ruling of the court refusing to strike out the evidence the defendant excepted and prayed that its exceptions be saved it, which was done. The defendant then introduced some witnesses on its behalf, whose evidence did not materially change the evidence of the plaintiff, and it is so agreed by the parties, that said evidence need not be inserted. The jury retired to their room to consider of their verdict, and afterwards returned into court with the following verdict: 'We, the jury, find for the plaintiff, and assess his damages at \$107.50.' The attorneys for the defendant moved the court to set aside verdict and grant it a new trial, because the same was contrary to the law and the evidence. Thereupon the court overruled the defendant's motion and refused to set aside the verdict and grant it a new trial as prayed for; to which ruling of the court in refusing to set aside the said verdict and grant a new trial the defendant by its attorneys excepted and prayed that this, its bill of exceptions to all and each of the rulings aforesaid, might be signed, sealed and made a part of the record in this case, which was accordingly done."

The city of Huntington afterwards, on October 28, 1887, obtained from the judge of the Circuit Court of Cabell county a writ of *certiorari* and a writ of *supersedeas* to this judgment of said justice, which was executed by the sheriff of said county by delivering to E. M. UNDERWOOD an office-copy of this summons and by an acceptance of the same indorsed thereon by the counsel of William Biggs, Sr. And on November 3, 1887, the said justice, E. M. UNDERWOOD, filed in the clerk's office of the Circuit Court of Cabell county the original papers of said case, which with the transcript of the record thereof shows it to have been as above stated. And on March 22, 1888, the Circuit Court made this final order in said case:

"The following order is entered as the order of this court *nunc pro tunc* in the place and stead of the order of this court in said cause entered on the 7th day of the present term of this court: This day came the parties, by their attorneys, and thereupon the plaintiff moved the court to dismiss the said *certiorari*

as improvidently awarded, which motion being considered is overruled by the court; to which ruling the plaintiff excepts. And the court, having maturely considered the transcript of the record of the judgment aforesaid, is of opinion that there is error in the judgment in said record; and this court proceeding to make such order as law and justice requires, it is therefore considered by the court that the judgment of the justice rendered herein on the 10th day of October, 1887, be, and the verdict of the jury rendered herein is, set aside; to which said rulings and each of them, and to which judgment, the plaintiff excepts. And it is further considered by the court that the action of the plaintiff be and the same is hereby dismissed, and that the defendant, the city of Huntington, recover against the plaintiff its costs by it in its behalf in this court and before the justice expended, including \$5.00 as allowed by statute; to all of which rulings, judgments, and orders the plaintiff excepts."

From this order a writ of error and *supersedeas* was awarded William Biggs Sr. by a judge of the Supreme Court of Appeals of West Virginia on his giving bond with security in the penalty of \$100.00, conditioned according to law.

Gibson & Michie for plaintiff in error.

Simms & Enslow for defendant in error.

GREEN, JUDGE:

In this case the question is raised as to the civil liability of a municipal corporation for an injury to a private person, caused by defective streets and sidewalks. The city of Huntington, the defendant, is a municipal corporation subject to section 53, c. 43, Code W. Va. 1887, p. 331, which provides, that "any person, who sustains an injury to his person or property by reason of a public road or bridge in a county or by reason of a public road, bridge, street, sidewalk or alley in an incorporated city, village or town being out of repair may recover all damages sustained by him by reason of such injury in an action on the case in any court of competent jurisdiction against the county court, city, village or town, in which such road, bridge, street or sidewalk may be, except

that such city, village or town shall not be subject to such action, unless it is required by its charter to keep the road, bridge, street, sidewalk or alley therein, at the place where such injury is sustained, in repair."

It will be observed, that the statute in express terms makes the town liable for damages for injuries sustained by reason of a defect in a public street or sidewalk. The language is unqualified and without exception or limitation; and therefore the question of notice or want of care on the part of the town is altogether immaterial. If the street or sidewalk was in fact defective, and such defect caused the injury to the plaintiff, it is no defence on the part of the town, that it had exercised great care in repairing the street or sidewalk. It is only necessary in such suit to allege and prove the existence of the defect, and that the injury was occasioned thereby. See *Sheff v. Huntington*, 16 W. Va. 307; *Chapman v. Town of Milton*, 31 W. Va. 384, (7 S. E. Rep. 22.) See, also, *Shear. & R. Neg.* § 389.

It is true, that the rule is otherwise in the case of towns or municipal bodies, upon whom no such absolute liability is imposed by their charter or by statute-law. They are only bound to exercise ordinary care and vigilance in keeping their streets in repair. And therefore before they can be made liable for injuries caused by a defect in a street or sidewalk not arising from its construction, or from some act authorized by the corporation, either express notice of the nuisance or defect must be brought home to it, or the defect must be so notorious as to be observable by all for a sufficient time to enable the corporation to repair. *Shear. & R. Neg.* § 407; 2 *Dill. Mun. Corp.* § 1029. In such cases it is essential, that the plaintiff should both allege and prove notice to the corporation of the defect, which caused the injury. But in the other case it is not necessary. See *Noble v. City of Richmond*, 31 Gratt. 271; *Chapman v. Town of Milton*, 31 W. Va. 384; (7 S. E. Rep. 23.)

The defect, which caused the injury to the plaintiff's property—the killing of his horse by his falling into a well—was not precisely adjacent to any street or sidewalk of the city of Huntington. But the well was situated on the north side of Third avenue in the corporate limits of the city of Hunt-

ington about one foot north of the northern limits of the sidewalk along this avenue. It was uncovered and unguarded by any fence separating the sidewalk or avenue from it or surrounding the mouth of the well; and travellers along this avenue or sidewalk were not notified of the danger resulting from the fact, that there was an open well within one foot of said avenue and sidewalk either by exposure of a light or the display of any other signal of danger. There was opposite this well on the south side of the avenue a plank sidewalk usually used by foot-passenges, but there was no sidewalk on the north side of the avenue, where the open well was located. The sidewalk there was nothing but the natural dirt on a level with the open mouth of the well; and it was separated from the portion of the Third avenue used by vehicles and by travellers in vehicles only by a shallow gutter three or four inches deep and some three feet wide; so that the traveller along Third avenue had nothing in the way of a curb-stone or in any other form to indicate to him, where the northern border of the avenue began. There was nothing in fact to indicate to the traveller, when he had left Third avenue and was driving on the sidewalk along the northern border of the avenue, or when he had left it and was driving on uninclosed ground on the north of the sidewalk and on the same level with this sidewalk.

Under these circumstances Dr. Beardsly, a physician in the employment of the city of Huntington to attend certain paupers in the limits of the city, was on the night of September 25, 1886, at about ten o'clock called upon to attend one of the paupers. He got into his buggy, to which was hitched the plaintiff's horse worth about \$200.00. He drove down Third avenue in the city of Huntington, until he got to a point opposite, where this sick pauper lived. Some one in the front door of her house, which was about ten yards north of the northern limits of this avenue, called to him and told him, that that was the place and asked him to come in. He therefore turned short at right angles in this Third avenue and drove across this dirt sidewalk, not separated from the avenue by any curb or in any other manner, his purpose being to drive across the ten yards intervening between the north line of this sidewalk and the fence surrounding this

pauper's house and hitch his horse to this fence. The horse barely crossed this sidewalk, when his front feet sank down in the open well, and shortly afterwards his other feet also sank down in this well. The doctor and a young man, who was with him in the buggy, jumped out and united in their efforts to save the horse. These efforts detached him from the buggy, and the horse then fell into the well and was killed.

None of the city-officials directed the doctor to pay this visit to this pauper, but he often went to see patients of the city without any special direction from any of the city authorities. There was no fence between the line of the street and this well and no barrier, guard or signal-light at the well. The doctor was ignorant of the existence of this open well, and while he knew, that in driving across the sidewalk to hitch his horse to the fence around the pauper's house, he would quit this Third avenue, still he knew also, that horses sometimes in going along this Third avenue quit its nominal boundaries, as he was doing, and drove on this open unclosed ground on the north side of this avenue. In doing this he did not know he was incurring any danger, as he knew nothing of the existence of the well. It was proven that the mouth of the well was sometimes covered and sometimes not. There was no fence separating the mouth of this well from this Third avenue for about thirty feet.

The city of Huntington, the defendant in error, insists that Dr. Beardsley, who had charge of the plaintiff's horse at the time it fell into the well, drove out of Third avenue intentionally and knowingly for his own convenience to tie his horse to the fence of a vacant lot; and that, if a traveller without necessity or for his own convenience or pleasure deviates from the travelled track, which is in good condition, and in so doing meets with an accident outside of such track, the town is not liable for any resulting damages. Whart. Neg. § 968. There are certainly authorities which give more or less countenance to these views. See *Keyes v. Village of Marcellus*, 50 Mich. 439 (15 N. W. Rep. 542); *City of Scranton v. Hill*, 102 Pa. St. 378; *Sykes v. Piolet*, 43 Vt. 446. There are, however, numerous cases where a traveller, though he meets with an accident off from the public street, has nevertheless recovered of the town the damages

he has sustained, when sustained very close to the edge of the public highway. The following were cases of this description: *Niblett v. Nashville*, 12 Heisk. 684; *Turnpike Co. v. Crockett*, 2 Sneed 271; *Memphis v. Lasser*, 9 Humph. 757; *Burnham v. Boston*, 10 Allen 290; *Hill v. Boston*, 122 Mass. 349.

We think, the true rule to be deduced from these cases is, that, if either an obstruction, excavation or hole be permitted by a town to exist though not actually within one of the public streets of the town yet so close to such a street as to produce danger to a traveller or passenger, who is using such highway or sidewalk prudently and properly, the corporation is liable for an injury for permitting such nuisance, though it be only close to the street and not immediately in such street.

My conclusion is that, if this open well was near enough to the travelled highway—Third avenue in Huntington city—to render the travelling on this highway dangerous; if this well uncovered and without barriers or fencing and without signal-lights to warn travellers left in this condition by the city of Huntington became the cause of the horse of the plaintiff falling into said well, while Dr. Beardsley was using this Third avenue in a prudent manner in the same way, that it was commonly used by travellers,—the city would be responsible.

The question, then, is whether Dr. Beardsley turning out of Third avenue and tying his horse, as was frequently done, to a fence within a short distance from this highway and not separated from it by an obstruction ceased to be a traveller, not meeting with the accident in attempting to use this avenue as a thoroughfare. This was, it seems to me, a question for the jury to decide, and it seems to me, that in deciding, that he did not intend to leave the highway and cease using it, they were sustained by the evidence, which showed, that, when the accident occurred, the buggy was still in this highway or on the sidewalk, and the horse not more than one foot from the northern edge of the highway and separated from it by no fence, curb or anything else. I am therefore of opinion, that the Circuit Court should have approved and affirmed the judgment of the justice, E. M. UNDERWOOD, ren-

dered Oct. 10, 1887, and should have rendered a judgment, that the plaintiff below, William Biggs, Sr., recover of the defendant below, the city of Huntington, his costs in the Circuit Court of Cabell county incurred, and damages according to law.

But the other members of the court are of opinion, that on the evidence in the case the jury was not justified in deciding, that Dr. Beardsley did not intend to leave the public highway and had not ceased using it as a public highway, when and where the accident occurred. And certainly it would be difficult to draw such conclusion in view of the fact, that Dr. Beardsley himself testified, "that he turned short in Third avenue and drove across the sidewalk for the purpose of hitching horse and buggy to the fence on a lot by the side of the house he was going to, which fence was outside the line of the street, and some thirty feet from the north line of the street, and he knew he was driving towards the fence." The necessary conclusion, they think, from this evidence is, that he without necessity and for his own convenience purposely left the travelled track of Third avenue, and that by so doing he met with this accident of the horse falling in this well; and that, if this was so, and the jury could not on the evidence find otherwise, then the city was not responsible, no matter how close the open well was to Third avenue; and therefore the verdict of the jury was so contrary to the overwhelming weight of the evidence, that it ought to have been set aside by the justice, and a new trial awarded, and the Circuit Court should have reversed the judgment of the justice for the amount found for the plaintiff by this verdict.

I admit, that the decided weight of the evidence was opposed to the verdict found by the jury, though I do not concur with the other judges, that it was so overwhelming as to require us to set aside the verdict, though the justice, who heard the evidence, refused to do so. The Circuit Court, in the opinion of a majority of this Court, did not err in reversing the judgment of the justice and in setting aside, reversing and annulling the verdict of the jury. But all the members of our court are of opinion, that the Circuit Court did err in dismissing the action of the plaintiff and rendering a

judgment in favor of the defendant against the plaintiff for its costs including five dollars allowed by statute. The verdict of the jury having been set aside, no judgment could properly be rendered, until the case has been again tried by a jury either before a justice or before the Circuit Court. As the court below has not acted on the question, whether this new trial should be had in the Circuit Court or before the justice as a court of review, we express no opinion on this point, but, will simply reverse the decision of the Circuit Court at the costs of the defendant in error, and remand the case to the Circuit Court, to be there proceeded with according to the principles laid down in this opinion, and further according to law.

REVERSED. REMANDED.

CHARLESTON.

CHILDS v. HURD.

Submitted January 19, 1889. Decided February 11, 1889.

1. MORTGAGE—DEED—CORPORATIONS.

A mortgageor left in possession of the mortgaged premises is entitled to the rents, issues and profits of them without rendering an account of them to the mortgagee, who can never recover them from him. The mortgageor is regarded in equity as the real owner of the property, a court of equity regarding a mortgage as a mere security, and the mortgagee, though the legal title be in him, as having a chattel-interest. (p. 87.)

2. MORTGAGE—FORECLOSURE.

If therefore a suit to foreclose a mortgage whether of real or personal property be brought by the mortgagee, the mortgageor will continue pending the suit to take the rents and profits or use of the mortgaged property, unless the court by its order appoint a receiver, and he takes possession of it. Till the receiver takes actual possession of the mortgaged property, the mortgageor in possession takes the rents, issues and profits or has the use of the property as owner without rendering an account thereof. (p. 89.)

3. MORTGAGE—FORFEITURE.

But after forfeiture the mortgagee has a right to take possession

32	66
41	345
39	66
44	563
45	666
32	66
53	62

of the mortgaged property and hold the same without rendering an account of the rents, issues and profits other than applying them to the payment of the debt secured by the mortgage. (p. 90.)

4. MORTGAGE—FORECLOSURE.

If the suit brought by the mortgagee be not a simple suit to foreclose the mortgage, but it be brought also to require an agent of the mortgageor in possession and use of the mortgaged property to render an account and to have the rents and profits taken possession of and paid over to the parties entitled to them or having a lien or claim on them, such agent and all having any lien or claim to such rents will be regarded, as though he had been a receiver appointed by the court, and the rents, issues and profits of the mortgaged premises will be ordered to be paid into the court by him; and the court will dispose of the same according to the rights of the parties; and in such case the mortgagee will have a superior right to such rents, issues and profits to any creditor acquiring a lien on them subsequent to the institution of the suit. (p. 90.)

5. MORTGAGE—FORECLOSURE.

If in such suit the mortgaged premises is a lease of lands to the mortgageor for the purpose of mining coal or iron on the same during the continuance of the lease, and the lessor retains a certain amount on every ton of coal or iron mined as royalty with or without a provision in the lease, that no coal or iron shall be moved from the premises, till such royalty be paid, such landlord has a right to be paid before the mortgagee out of any funds in the hands of the agent of the mortgageor, arising out of the sale of coal or iron mined on the premises, and paid into court. (p. 117.)

6. MORTGAGE.

A railroad is built on such leased premises in order to facilitate the mining of such coal and iron ore. Such railroad passes to the mortgagee in a mortgage made by the lessor of such land; and, if the proceeds of the sale of such iron of said railroad track come into the hands of the court in such suit, they will be directed to be paid to the mortgagee in preference to any lienor subsequent to the recording of such mortgages. (p. 112.)

7. MORTGAGE—FORECLOSURE—ATTACHMENT—PRIORITY.

In such a suit none of the defendants, creditors of the mortgageor, can gain any priority over other defendants by levying an attachment pending such suit on an agent of the mortgageor having such leased premises in his possession. (p. 91.)

8. DEED—CONSIDERATION—EVIDENCE—FRAUDULENT CONVEYANCE.

The recital in a deed, that the consideration was valuable and paid, is no evidence of such payment as against creditors of the grantor assailing such deed as voluntary and therefore fraudulent as to them. (p. 100.)

9. CORPORATIONS.

Where the statute law of a state requires, that, before a corporation can do any business, it shall record in a certain county the certificate of its incorporation, this is a condition precedent, and the corporation has no power to transact any business, till such condition is complied with, and such corporation has really no existence, till such certificate of incorporation is so recorded. (p. 99.)

10. LANDLORD AND TENANT—FIXTURES.

A tenant may remove fixtures, which he has put on leased premises, at any time during his lease, or while he continues tenant, but after the expiration of the lease and the surrender of the premises to the landlord he cannot enter on the premises and remove any fixtures, for when he quits the premises leaving his fixtures behind him, it will be presumed, he intended to abandon them. (p. 102.)

11. COMMISSIONER OF COURT—REPORT.

If a commissioner fails entirely to report with reference to any of the matter referred to him, the court should refer the matter to him again to be reported upon, and this should be done, though no one except to such report. No one's right can be regarded as abandoned or prejudiced by his failure to except to such report. (p. 103.)

12. JUDGMENT—SALE—EXECUTION—RAILROAD.

When the iron on a railroad is sold under an execution as personal property, but the proceeds are brought into a court of equity to be disposed of to the proper parties, such proceeds should be paid by the order of the court to the owner of the lease not to the execution-creditor. (p. 115.)

S. P. McCormick, C. Boggess and J. Bassel for appellants.

J. W. Mason for Childs and Brown.

F. Woods for E. G. Jeffries.

Statement of the case by GREEN, JUDGE:

The record in this case is very large containing upwards of 400 printed pages. I will endeavor to give a concise statement of the material facts.

On January 2, 1878, Samuel Colgate of New Jersey leased to Charles S. Hurd of Taylor county about 2,000 acres of coal-land in Preston county, W. Va. The lease was for five years commencing May 1, 1878; and said Hurd agreed to pay ten cents *per* ton for all coal mined by him during this time on said land. The property was located on the Balti-

more & Ohio Railroad at Austen and was known as the "Austen Mines." These mines had already been worked; and the lease included all the works and property on the ground then used for mining coal, and the timber on said land necessary to keep the mines in proper condition, to be selected with the assent of M. L. Shaffer, when practicable. The royalty of ten cents *per* ton on all coal mined was to be paid quarterly; and thirty days after the end of each quarter the lessee, Hurd, was also to pay \$250.00 rent *per annum* for a store-room. If any part of said rents and royalties were in arrears for thirty days, after the rent was due and demanded, the lessor, Colgate, was authorized to enter into and distrain upon said mines and premises or dispose of same in due course of law as landlord.

Hurd entered into the possession of the land under this lease at once and began to operate the mines extensively converting much of the coal mined into coke, which was consumed at Hurd's iron-furnaces at Ironton, Taylor county, W. Va.

Hurd became indebted to Edward F. Browning, and on May 15, 1879, he executed to Browning a mortgage on a claim, which he had against the Lancaster Furnace & Mining Company, secured by a deed of trust from said company to Krauss, trustee, dated December 22, 1874, and recorded in said Taylor county, W. Va., and on said deed of trust and on all his property, real, personal or mixed in Taylor county, which is described as all the property conveyed to said Hurd by Jacob Krauss by deed dated February 7, 1878, and duly recorded in said county of Taylor. This mortgage was in form an absolute deed and was duly recorded. The debt to Browning was by the court in this cause ascertained to be \$4,773.29.

About three months afterwards, on August 13, 1879, Hurd executed to Joseph S. Brown and A. A. Childs a mortgage on the Austen mines and also a lease to certain property made to said Hurd by one Ulman at Ironton furnace in Taylor county and all the personal property of every nature and kind connected with said furnace or said coal-mines as security for the compliance by said Hurd with and fulfillment of a contract made by him with said Childs and

Brown, whereby they agreed to advance to said Hurd on account of iron delivered by him to them moneys not exceeding \$12,000.00 in the manner following: During the month of August, \$3,000.00; during September, \$5,000.00; and during October (if the delivery of the iron should not have been completed) so much as C. S. Hurd may want; and by this contract said Hurd sold to Brown and Childs 1,000 tons of pig-iron, to be made as soon as possible at said furnace, at \$15.00 per ton, to be delivered at Pittsburgh. The amount due on this mortgage for advances made by Childs and Brown with interest to November 4, 1885, afterwards turned out, as ascertained by the court, to be \$2,353.67.

Some ten months afterwards, on June 10, 1880, Hurd executed a second mortgage on the Austen mines and also on the Waldorf furnace-property and also certain leases of iron-land in Taylor county, W. Va., made to said Hurd by one F. Leon Clerc. This mortgage was made to secure a note for \$15,000.00, payable to said Childs ten days after the date of this mortgage. The amount of this debt secured by this mortgage, as afterwards ascertained by the court, was on November 4, 1885, \$4,696.10, with interest from June 1, 1881, \$1,246.81, or a total as of November 4, 1885, of \$8,296.58.

On the 5th of February, 1881, a creditor of said Hurd, Thomas N. Jeffreys, issued an attachment in an action of *assumpsit* against him in the Circuit Court of Taylor county to satisfy a debt of \$5,000.00, which attachment was levied on that day on the estate of said Hurd in the said Waldorf furnace-property, a list of which is given, including a locomotive engine. It was also levied on the Baltimore & Ohio Railroad Company as garnishees on the same day. Between the 5th and 10th of February, 1881, this attachment was levied on additional personal property of said Hurd; and on August 19, 1881, it was served on Martin L. Shaffer as garnishee. Martin L. Shaffer was said Hurd's agent in control and possession of said Austen mines from about January 15, 1881, till May 1, 1883, when the Colgate lease of said mines to said Hurd expired. A judgment was rendered against Hurd in said action on August 11, 1881, for \$7,001.15 with interest from that date and \$34.47 costs. This judgment became by

assignment the property of Eugene G. Jeffreys; and on November 16, 1887, amounted to \$9,666.88. On January 1, 1881, said Hurd assigned to the Austen Coke Company, a New York corporation, said Colgate's lease of the Austen mines. This assignment was claimed to be fraudulent and void as to creditors of said Hurd and was so held by the court below.

While Martin L. Shaffer was in the possession of the Austen mines, there came into his hands from the sale of its products \$6,743.11, which with \$300.00 derived from the sale of certain mules by Hurd was paid into court on November 20, 1885. Albert H. Childs at June rules 1881 filed his bill in the Circuit Court of Taylor county to foreclose his said mortgage of June 10, 1880, on the Waldorf furnace property, the Austen mines property and said Clerc lease to Hurd. This bill also made the judgment-creditors of said Hurd defendants. These were set out in the bill:—one justice's judgment rendered March 7, 1881, and some fifty justice's judgments rendered March 12, 1881. On all these executions were promptly issued. There were also fourteen other judgments rendered by another justice of Taylor county during the months of February, March and April, 1881. On these judgments also executions were issued promptly. All of these judgment-creditors as well as Thomas N. Jeffreys, who had issued his attachment aforesaid on February 5, 1881, and also those creditors, who had obtained judgments at the March term, 1881, of the Circuit Court of Taylor county, were made defendants to this bill. Executions issued on the three last judgments on April 14, 1881. The bill concludes thus:

"Plaintiff thereupon charges and alleges, that his said mortgage is a lien upon said Ulman lease and personal property at and upon said furnace-premises third in priority, the said Browning's mortgage being first, and said Brown and plaintiff's mortgage being second; that his said mortgage as to said Colgate lease is a lien second in priority, said Brown's and plaintiff's mortgage being first. Plaintiff therefore asks that said Ulman and Colgate leases and said personal property hereinbefore described be sold, and that his said claim be paid out of the proceeds arising therefrom; and he

asks such further and general relief as the court may see fit to grant."

All the defendants appeared to the bill, and filed a general demurrer thereto, which by its decree of August 11, 1888, the court overruled; "and by consent of all parties the cause was referred to a commissioner to ascertain and report all the property real and personal belonging to said Hurd in West Virginia together with the liens thereon and their respective priorities."

October 20, 1881, the commissioner reported that Charles S. Hurd owned no real estate in West Virginia: that he owned the following personal property in Preston county W. Va.; (1,) a certain leasehold interest on about 2,000 acres of land, being the leasehold interest granted to said Hurd by Samuel Colgate of New Jersey dated January 2, 1878. This has been hereinbefore fully described. The following the commissioner reports as the liens on said property according to their priorities: first in priority, mortgage to Allen H. Childs and Joseph S. Brown hereinbefore described amount due with interest to November 4, 1881, \$13,349.85; second in priority, mortgage to Albert H. Childs, date June 16, 1880, duly recorded therein, heretofore particularly described, amount due with interest to November 4, 1881, \$19,622.21. The commissioner reported, that in addition to this mortgage Albert H. Childs held as collateral security for this debt 750 tons of pig-iron, estimated at \$19.00 or \$20.00 per ton; and that after the execution of the two foregoing mortgages on the 15th day of January, 1881, the defendant Charles S. Hurd assigned said lease to the Austen Coke Company subject to this mortgage. The commissioner then reports in detail the personal property situated in Taylor county owned by said Hurd. It is property connected with Waldorf furnace property belonging to said Hurd. He states, that he ascertained what belonged to Hurd by taking all the furnace property, which had been levied on by an officer, and deducting from it all the personal property at this furnace, at the time said Charles S. Hurd took possession of it under his lease from Ulman, as shown by the deposition of Reuben Watte and Thomas N. Jeffreys, returned with the report. A portion of this

personal property had been sold by a constable under a distress-warrant for rent, bringing \$844.00, which had all been paid out for taxes or rent and costs excepting \$27.97, still in the constable's hands. This constable also sold under execution a bay horse, the property of the Lancaster Furnace & Mining Company, subject to a certain lien for \$32.78. He paid for keeping the horse \$7.60, and the balance, \$25.15, he still has in his hands; and he has also \$82.00 the proceeds of the sale of a horse belonging to said Hurd sold under execution; the total amount in his hands being \$130.12.

The following is reported in reference to the property of the Lancaster Furnace & Mining Company: They are the owners of certain property at the Waldorf furnace at Iron-ton Taylor county, W. Va. The report gives a list of this personal property, two items of which the railroad iron on two and a half miles of railroad track, two steam-engines besides various other items of personal property specified. Of this personal property the sheriff of Taylor county under execution of George Heller against the Lancaster Furnace & Mining Company sold the railroad iron, one locomotive-engine, three carts, one wagon and one steam-engine for a saw-mill. These sales amounted to \$1,707.14. These articles were all purchased by Mason, attorney for Heller, and by John S. Herr except certain articles purchased by others amounting to \$132.14; and this sum as well as all balances of said purchase-money, amounting to \$1,707.14 in all, was settled by the sheriff with Mason as attorney for Heller in said execution. There was a deed of trust on this property, which was the first lien on all the property of the Lancaster Furnace & Mining Company. It was a deed of trust to Krauss, trustee, to secure a debt of \$15,000.00, which with interest to November 4, 1881, amounted to \$20,417.50. This debt had been assigned to Charles S. Hurd on February 7, 1878, and was mortgaged by said Hurd to secure a debt to Edward F. Browning by mortgage dated and duly recorded May 1, 1879. The commissioner expresses the opinion, that said Hurd should be substituted to the trust-lien of Krauss on this property, and that Edward F. Browning, another lien creditor of said Hurd, should be substi-

tuted in place of said Hurd to the extent of the debt against said Hurd, as follows:

Amount of Browning's debt.....	\$1,421 37
Interest 14th February, 1880, to November 4, 1881.....	146 87
	1,786 34
Interest 8th November, 1879, to November 4, 1881.....	213 15
	<u>\$3,567 73</u>

Then followed forty six judgments against said Hurd aggregating in amount \$20,417.50, in thirteen classes. After all these judgments and as the fourteenth in priority is the judgment in favor of George Heller, amounting with interest to November 4, 1881, and costs to \$5,077.71. There is but one lien subsequent to this, and that is a judgment in favor of Samuel Carrothers amounting, debts, interest, and costs to November 4, 1881, to \$319.17. This part of the report concludes thus:

"The following liens on said Lancaster Furnace & Mining Company's property are also liens upon the said Charles S. Hurd's personal property situated at Waldorf furnace, in Taylor county, as heretofore reported, except that said Edward F. Browning's lien reported first in priority is not a lien upon said Hurd's personal property; said Hurd having mortgaged to said Browning only that property acquired by him [Hurd] through the Krauss deed of trust. This will make Thomas N. Jeffreys' attachment first in priority, and the other execution liens following in priority as they were heretofore reported, on the furnace property, except the liens of George Heller and Samuel Carrothers, reported fourteenth and fifteenth in priority, are not liens upon the personal property hereinbefore reported as belonging to C. S. Hurd."

The report then proceeds as follows:

"The Lancaster Furnace & Mining Company are the owners of a certain strip of land thirty feet wide, running through a tract of land on Three Forks, known as the 'Nichols Tract.' The following liens exist upon said land:

'First in priority, George Heller, judgment debt, interest, and cost.....	\$5,077 71
'Second in priority, Samuel Carrothers, judgment debt, interest, and cost.....	319 17
	<u>\$5,396 88'</u>

"*Waldorf Furnace Case.* The said Charles S. Hurd having failed to comply with his agreement with Alfred J. Ulman in regard to the lease of the said furnace property, said lease was forfeited, and said Alfred J. Ulman has taken possession of said property."

This report was excepted to by Edward F. Browning and Thomas N. Jeffreys. The cause was on November 22, 1881, heard upon the report; and by consent of parties the court without acting on said exceptions recommitted said report to the commissioner for the purpose of restating the plaintiff's claim and amending the report in such other particulars, as may be deemed proper by him or required by any of the parties hereto. There were some directions given in this decree in reference to the mode of settling the accounts of Hurd and plaintiff, which I do not deem it necessary to set out; and by the same decree by consent of parties it was ordered, that John W. Mason and Samuel McCormick, special commissioners, do sell the said lease of the Austen mines made by Samuel Colgate to Charles S. Hurd, which is dated January 2, 1878,—the sale to be made for one-fourth in cash and the residue on a credit of four, eight and twelve months with interest from the day of sale; the purchasers executing bonds therefor with good personal security. And other usual and proper directions are given with reference to said sale in said decree.

John W. Mason, one of these special commissioners, sold this lease of land known as the "Austen Mines" in the manner stated in his report, Edward Austen being the purchaser, for \$500.00. The sale report was excepted to by the Austen Coke Company for reasons set forth in a petition filed at the next term of the court, which asked the court to set aside this sale. But the motion was overruled; and the Austen Coke Company then offered for said property an upset bid of \$5,500.00, in case the sale should be set aside and bidding reopened, securing the same by bond with approved security; and thereupon the court set aside the sale made to Edward Austen. From this decree the purchaser, Edward Austen, obtained an appeal and *supersedeas*, which was dismissed by this Court as improvidently allowed, before such re-sale had been made and confirmed. See *Childs v. Hurd*, 25 W. Va.

530. This decision was rendered April 4, 1885. In the meantime the said lease of the Austen mines by Colgate to Hurd expired, towit, in May, 1883, so that there remained nothing for the special commissioners of the court to sell.

On November 18, 1887, Eugene G. Jeffreys filed his cross-bill in this cause, in which he states, that on February 5, 1881, in said Circuit Court Thomas N. Jeffreys, a defendant in the original suit, commenced an action of *assumpsit* against said Hurd, accompanying it with an attachment for \$5,000.00 and the costs of the suit; which attachment was issued and served on that day on Hurd's estate in said Austen mines.

The evidence of these levies was filed with the cross-bill, which stated, that in said action of *assumpsit* on August 11, 1881, Thomas N. Jeffreys recovered against said Hurd \$7,001.15 with interest from that day and \$34.47, which judgment was transferred and assigned by him to the plaintiff in the cross-bill, Eugene G. Jeffreys. The cross-bill further alleges as follows: that on May 1, 1878, the defendant, Hurd, under said Colgate's lease took possession of the Austen mines and at once began to mine large amounts of coal therein and to convert much of it into coke; that he employed the defendant Martin L. Shaffer as his agent to carry on these mining and coking operations and put him in possession and control of said Austen mines property; that he continued as such agent to carry on these mining and coking operations till May 1, 1883, when said lease by Colgate of said property expired; that the royalty due said Colgate under said lease for the coal mines was regularly paid to him; that, when said Hurd put said Shaffer in possession of said Austen mines as superintendent, the said Hurd at once removed from this State and has ever since been a non-resident of this State; that as such agent and superintendent Shaffer received from said Austen mines property many thousand tons of coal, out of which, this cross-bill alleges, he manufactured and sold at least 35,393 tons of coke, and made a net profit of at least \$11,915.17, after retaining all sums due from said Hurd as salary and as his debtor; of which net profit Shaffer expended without consent or authority of said Hurd \$4,062.78 in building on the premises with the knowledge and consent of the landlord Colgate twenty new ov-

ens, which increased the value of said Austen mines property to the full extent of the cost of the ovens; and that Shaffer is indebted to said Hurd to the full extent of said net profits of the said mines, \$11,915.17, with interest thereon from May 1, 1888, less the sum of \$4,062.78, unlawfully and wrongfully expended in building said twenty coke-ovens.

This cross-bill further alleges, that in said original suit of *Childs v. Hurd* under a decree dated April 8, 1882, directing a re-sale of said lease of the Austen mines property it was offered for sale on July 27, 1885; but that McCormick and Armstrong, who had offered the upset bid of \$5,500.00, wholly failed to bid on said property or pay for the same or take said property at any price, as it was then of no value, the said lease having then expired; and that the defendants McCormick and Armstrong were liable to pay into the court their said upset bid of \$5,500.00 with interest thereon from July 27, 1885, and that this money is liable to be first applied to the plaintiff's claim, he having a lien thereon by virtue of the said attachment.

The cross-bill also alleges, that in the original cause of *Childs v. Hurd* an order was made directing Shaffer to pay to the general receiver of this court \$7,043.11, which was the amount due from him to said Hurd as his agent and superintendent, excluding however the interest from May 1, 1888; that said Shaffer paid said sum to said receiver but still owes the interest on said sum from May 1, 1888.

In this cross-bill the plaintiff, Jeffreys, claims, that under the aforesaid two mortgages on Austen mines property no rights passed to the mortgagees either Childs or Brown, to change any part of their claims secured by the same mortgages on the rents and profits of the said Austen mines; that in the original suit they did not make this claim but sought only to subject the lease-property itself to sale; and that as to the rents and profits of said lease-property in the hands of Shaffer the said Childs and Brown by said mortgages had no lien upon the same, and that he Shaffer was simply indebted to Hurd individually therefor, and the plaintiff, Jeffreys, in this cross-bill acquired a lien on the same by his attachment served on Shaffer on August 15, 1881.

It is further alleged in this cross-bill, that said Hurd, when he

put said Shaffer in charge of these Austen mines as superintendent and as the agent of said Hurd in January, 1881, he, the said Hurd, was utterly insolvent and worthless, and that, this being his pecuniary condition, he changed his residence from West Virginia to New York, where he promptly associated himself with two other persons under the statute-law of that state and formed two distinct joint-stock corporations, these three persons being the only incorporators and trustees of both corporations, one called the "Alleghany Iron & Coke Company," and the other the "Austen Coke Company,"—both having their principal offices in the city of New York; that these companies were thus got up simply that all the property owned by the said Hurd including the Austen mines might be assigned to them said assignment being made with intent to hinder, delay and defraud the plaintiff in this cross-bill and other creditors of the said Hurd; that the certificates of the formation of both of these companies were made on the same day, January 14, 1881; that the acknowledgment of the agreement, the basis of each of these corporations, was made by these parties on the same day and before the same notary public, and on the next day they were both filed in the office of the clerk of the county of New York in the state of New York; but that no duplicate of either certificate was ever filed, as required by law, in the office of the comptroller of the treasury of New York; nor has either of these corporations ever filed in the office of the clerk of the county of New York any annual report, as required by law; nor has either of said corporations made any report to the comptroller of the treasury of New York, though both of these reports are required to be made under the laws; nor has either of these corporations ever transacted any business whatever; nor did either of them ever have any principal office or place of business in New York city; nor did either of them ever keep any stock-book, as required by law; nor did either of said corporations file with the secretary of state of West Virginia on or before January 15, 1881, a copy of said articles of association or of the law or authority, under which they were incorporated; nor was a certificate issued to either of said corporations by the secretary of state of West Virginia or recorded by either of said corporations in any coun-

ty of West Virginia; nor did either of said corporations place or file in the office of the clerk of the County Court of any county a copy of its articles of association or do any of the acts required by the laws of West Virginia to be done by such foreign corporations.

The plaintiff in this cross-bill still further alleges, that at the same time, January 15, 1888, and before either of said certificates of incorporation were filed in the office of the clerk of New York county, the defendant, said Hurd, executed with intent to delay, hinder and defraud the plaintiff in this cross-bill and his other creditors three assignments in writing; that is to say: One to Alleghany Iron & Coke Company of all of his property of every kind situated in Taylor county including the lease-premises in Taylor county, W. Va., conveyed to him (Hurd) by said Clerc, consisting of iron-ore mines of the value of many thousand dollars; also another assignment to the said Alleghany Iron & Coke Company of all his (said Hurd's) property of every kind on certain other premises in Taylor county, W. Va., leased to him (Hurd) by Alfred J. Ulman, where there was a blast iron furnace making pig-iron together with said furnace and lease-premises of the value of many thousand dollars; and the third of said assignments was to the Austen Coke Company of all his (said Hurd's) property of every kind on the Austen mines property in Preston county, W. Va., including the lease of the Austen mines property made by Samuel Colgate of New Jersey to said Hurd dated January 2, 1878; that each of these several assignments was promptly recorded in the office of the clerk of the county where the property therein assigned was located, that all these assignments were made at the same time, attested by the same witnesses, and acknowledged by said Hurd before the same notary public; and that they and the said two certificates of incorporation constitute one and the same transaction; that both of these corporations were created by said Hurd with intent to delay, hinder and defraud the plaintiff and his other creditors, and for the sole purpose of taking these assignments, and do constitute a part of the fraudulent scheme carried out by said Hurd to hinder, delay and defraud his creditors; that the said Austen Coke Company was not in existence, when said

assignment of it was made; that neither of said corporators ever did or pretended to do any business, or owned or pretended to own any property whatever, except that the Austen Coke Company pretended to own said Austen mines, which continues to be really the property of said Hurd since said assignment, as it was before; that the Austen Coke Company is but another name of said Hurd, and the pretended assignment to it was without consideration and fraudulent as to the plaintiff's claim, and was known and so intended both by the said Hurd and by the other two corporators and trustees composing what was called the "Austen Coke Company;" that, the said Hurd being the president of each of these corporations, they knew all that Hurd knew with reference to these assignments, and were of course aware that they were voluntary and fraudulent as to the creditors of said Hurd, though stated on their face to have been for a consideration of \$100.00 and other valuable consideration; that one of these corporations, the Alleghany Iron & Coke Company, has never claimed or pretended to claim the valuable properties so assigned to it as aforesaid; but that the said Austen Coke Company in this original suit claim the whole of the net issues and benefits of the Austen mines, which so came into the hands of said Shaffer, including the money so paid by him into the hands of the receiver of this court in this suit.

The prayer of the cross-bill is as follows: "To the end that plaintiff may be relieved in the premises, he prays, that an attachment may be issued herein against the defendant, Hurd, for said \$7,001.15 with interest thereon from 11th August, 1881, and \$34.47, the costs of said judgment, and the costs of this suit; that, as to said money paid into the hands of the general receiver of court, plaintiff may have the benefit of the lien of the attachment issued herein, and the benefit of his said attachment issued in his action at law on the 5th day of February, 1881; that the defendant Shaffer may be required to pay out of said \$11,915.17, and its accrued interest since it came into his hands, the claim of plaintiff and the costs of this suit; that plaintiff's claim may be paid out of the said \$7,043.11, now under the control of this court, in the hands of its general receiver; that the said assignment executed by the

defendant Hurd to the Austen Coke Company of the Austen mines may be set aside and overruled as to plaintiff's claim; that the defendants McCormick and Armstrong be required to pay into court said sum of \$5,500.00, with interest thereon from July 2, 1885, hereinbefore mentioned; that the cost of building said twenty new ovens may be charged to the defendant Colgate in payment of his claim for royalties on coal mined by Shaffer after January 15, 1881; and that plaintiff may have in the premises such other, further, and general relief as the nature of his case may require, and to equity appertains."

At the March rules, 1886, the Austen Coke Company filed its answer to this cross-bill. It claimed, that it was a corporation duly incorporated under the laws of New York and duly entered and registered under the laws of West Virginia, and as such entitled to hold property and transact business in these states, and to be fully protected in its corporate rights. The answer avers, that in the exercise of its corporate rights on the 15th of January, 1881, it became the purchaser for a good and valuable consideration of the interest of Charles S. Hurd in certain leasehold property at Austen in Preston county, W. Va., known as the "Austen Mine & Coke Works," conveyed to said Hurd by Colgate by lease dated January 2, 1878, for the purpose of mining coal, and coking and marketing the same; that it at once took possession of said property by its agent, Martin L. Shaffer, who had been the agent of said Colgate and said Hurd, but who was directed to account to the respondent, said Austen Coke Company; and the respondent, said company, from the time of said purchase, January 15, 1881, became the owner of said Austen mines, rents, issues and profits, and is not subject to the attachment issued by the plaintiff in the cross-bill, some three weeks afterwards, on February 5, 1881, against said Hurd, who had no sort of interest or ownership in any of said property levied on as his under this attachment.

In said answer the company denies, that it was created to hinder, delay and defraud the plaintiff and other creditors of said Hurd, or that it was in collusion with him for any such purpose. It denies, that it has no principal office or

place of business in New York city, and that it has not transacted business and has not kept stock and other company books, and says the contrary is the truth. It claims, that all such allegations are impertinent, averring, that while all certificates and reports required have been made and filed, it would not at all affect its rights in this suit, were these allegations true; as it claims that, did all the negligence stated in the cross-bill exist, yet the plaintiff in this cross-bill could take no advantage thereof. This answer asserts, that the Austen Coke Company is a corporation legally created and competent to take and hold the property assigned to it; that it transacted business and did purchase and take possession of said property and is the legal owner thereof; that the assignment to it of said property was for a valuable consideration and was in no wise fraudulent, and therefore the defendant, Hurd, had no ownership of any of said property and did not control the same nor the stock of said corporation; and that the said corporation after said assignment owned said Austen mines property and the rents, issues and profits thereof.

The said company makes a part of its answer the record of a suit in chancery brought by it in the United States District Court of West Virginia against said Martin L. Shaffer and others. This suit was brought in April, 1882. It set out the facts alleged in this answer, and asked that Martin L. Shaffer, as the agent and superintendent of the Austen Coke Company, be required to account for the rents, issues, and profits thereof since May 15, 1881. Martin L. Shaffer, Samuel Colgate, and Charles S. Hurd were defendants in this suit, and it prays, that said Shaffer may render an account of his agency as such superintendent of said Austen mines since January 15, 1881, and deliver to the Austen Coke Company full possession of said leasehold property, machines, machinery and all other property on said leasehold premises, as fully as it was granted by said Hurd to the Austen Coke Company.

So far as the record before us shows, it does not appear what has been done, if anything, in this suit in the United States District Court of West Virginia, other than the filing of the bill, or that anything else has been done.

Mary E. Clerc, devisee of F. Leon Clerc, filed an answer to the original bill, in which she claims, that her testator devised to her certain land, which has been leased to the Lancaster Furnace & Mining Company for twenty five years from June 3, 1874; that about two years thereafter the said company abandoned said lease; that by the terms of said lease they had no right to remove a certain railroad track which they had laid down; and, so far as it is on the land devised to her, it is claimed by her as part of the realty. She also claims a portion of the said land as the heir of one of her brothers, who was a lessor of said land and said company, alleging that her testator, F. Leon Clerc, became after the surrender of said lease the owner in fee of said land; and that on November 19, 1877, said Clerc leased said land to said Hurd for fifteen years for the purpose of mining iron ore; that he did this, removing the iron ore to his furnace at Iron-ton; that on his lease when he quit owning said land that he owed a considerable royalty to her testator, which she claims. She claims, that the railroad iron, if regarded as personalty, should be applied to the payment of the royalty due from said Hurd.

Albert H. Childs filed an answer to this cross-bill, April, 1880. He says the mortgage executed for his benefit by said Hurd, June 10, 1880, was forfeited in July, 1880; that in April or May, 1881, he desiring to possess himself of said Austen mines under this Colgate lease and to have the same sold to pay the amount due him from said Hurd secured by said mortgage, found Martin L. Shaffer in possession of said property, claiming that he had been put in possession of it by said Hurd in January, 1881, under a contract, by which Shaffer was to pay himself a debt Hurd owed him, and pay certain moneys due miners, who had labored in mining on said land; that he learned in April or May, 1881, that the so-called Austen Coke Company was claiming the possession of said mines of Shaffer; and that in May, 1881, he instituted this suit, and Shaffer refused to give him or any one else possession of said moneys or leasehold, but said he would continue to operate them until they were sold, or he was legally dispossessed, or until the expiration of the lease, and pay the proceeds into the court, to be disposed of as it might

direct. He did so operate said mines, till said lease expired in May, 1883, and brought into court \$7,043.11, derived from the use of said mines. Childs in this answer claims, that he has the same liens upon the funds so brought into court by Shaffer as he had upon said mines and leasehold-property under his mortgage; that in fact said funds represent said lease; and that said lease has been thus in fact converted into money. He alleges, that in said original suit the court ascertained, that said Hurd was indebted to him \$4,696.10 with interest from March, 1882, secured by this mortgage; that no part of this has ever been paid. He claims, that with the money paid into the court by Shaffer there is now sufficient on hand to pay the entire amount due him, and claims that it should be so applied; and he denies that Jeffreys has any lien on this fund or upon said leasehold-property or moneys, till he (Childs) has been fully paid. He claims the rents, issues and profits of the Austen mines under the mortgage to him to satisfy his debt secured thereby amounting to \$4,696.10 with interest from March 20, 1882.

Samuel Colgate filed in July, 1886, his answer to said cross-bill. He admits his lease of January 2, 1878, to Charles S. Hurd for five years. He admits the receipt of all the royalty of ten cents *per* ton on all coal mined on said leasehold-property up to January 1, 1881, but alleges, that all accruing since then is still due and unpaid; and he asks that it be decreed to be paid to him, and he states the amount of coal, which has been mined, on which this royalty is due; and he claims, that the royalty due him ought to be paid to him out of the rents and profits of said coal-mines paid into the court by Martin L. Shaffer. He denies, that said Shaffer was his agent to collect said royalty. He avers, that no coke-ovens were erected on said leasehold-property by said Hurd by his direction, and that he is not responsible for any which said Hurd may have erected, and can not be charged with them under his lease to Hurd. All other allegations in the cross-bill are denied.

February, 1881, Charles S. Hurd answered this cross-bill. He denies, that the attachment sued out by Thomas N. Jeffreys was sued out on just grounds, or that the property levied on by the officers under these attachments was his (Hurd's)

property, or that said attachments were a lien on the rents, issues and profits of said Austen mines leasehold-property in the hands of Martin L. Shaffer. He denies, that he became in January, 1881, a non-resident of West Virginia. He avers, that he was then only temporarily absent in New York, where said companies were organized in perfect good faith openly and legitimately for the purpose of operating said coal and iron mines. The assignment to said companies was made in perfect good faith by respondent with no intent to delay, hinder or defraud his creditors. He alleges, that he claims no interest in said Austen mines, as, he says, he transferred and assigned all his interest therein to the Austen Coke Company, which was formed with no fraudulent purpose, but solely for the purpose of enabling the respondent Hurd to pay his debts, which he would have been able to do by the sale of his stock in said company, had not his agent, Shaffer, and the plaintiff, Jeffreys, prevented him from selling said stock or from realizing dividends from the earnings of the said mines and works. He further alleges, that the said company immediately after its organization in January, 1881, established its principal office in the city of New York, and had and kept the stock-book required by law and transacted its business.

S. P. McCormick, C. Boggess, and J. Bassel, for appellants.

J. W. Mason, for Childs and Brown.

F. Woods, for E. Jeffreys.

GREEN, JUDGE:

The most important question presented by this record is: To whom does the \$7,043.11 paid by Martin L. Shaffer to the receiver of the court under its order entered November 20, 1885, properly belong? It was the proceeds of the mining of the Austen mines by Charles S. Hurd, who was insolvent and unable to work them; and it was understood that out of the net proceeds of these mining operations Shaffer would pay the debt said Hurd owed to him and the debts he owed to sundry miners and laborers. Hurd's interest in said Austen mines, so placed under the management and control of

Shaffer, was a lease of certain coal-lands, about 2,000 acres, known as the "Austen Mines" for five years, by Samuel Colgate to Charles S. Hurd, which lease was created by a contract dated January 2, 1878, and expired May, 1883. After said Hurd had so leased this Austen mines property on August 13, 1879, he executed to John S. Brown and A. H. Childs a mortgage on the said Austen mines and certain other property. The amount of this debt so secured was ascertained to be \$1,838.09 with interest from March 1, 1881. On June 10, 1880, said Hurd executed a second mortgage on these Austen mines and other property to the plaintiff, A. H. Childs, to secure a debt of \$15,000.00 payable in ten days after date. The amount due on this debt so secured, as afterwards ascertained, was \$4,696.10 with interest from June 1, 1881, till paid. Of this sum paid in by Shaffer, Childs and Brown claim enough to pay the balance due on their mortgage, of \$1,838.09 with interest from March 1, 1881. A. H. Childs claims, that then the residue of the said fund should be paid on the debt secured by the mortgage to him. The balance due on it is \$4,696.10 with interest from January 1, 1881. In opposition to both these claims E. G. Jeffreys claims the whole of this fund under his attachment served on said Hurd's interest in the Austen mines property on February 15, 1881, and the court below based its action on this as the correct view.

It is insisted in argument by the counsel of Jeffreys, that the claims of Childs and Brown as mortgagees to this fund are invalid, because their mortgages, while prior liens on the lease of Austen mines by Colgate to Hurd, created no lien on the rents, issues and profits of the Austen mines. They had liens on the *corpus* of this lease; but as long as the mortgageor, Hurd, remained in possession, he and not his mortgagees were entitled to the issues and profits of the lease. The only way, in which the mortgagees could be entitled to the rents and profits, was to take possession of the property, which they had a right to do at any time after forfeiture or non-payment, when due, of the debts secured by the mortgages. This they had not done, but Hurd, the mortgageor, or his agent, Shaffer, remained in possession of the mines, taking the rents and profits till the expiration of the lease of Colgate to Hurd.

The law is well settled, that a mortgagee is not entitled to demand of the mortgageor or owner of the equity of redemption the rents and profits of the mortgaged premises, until he has actual possession. The rule on this subject is thus stated in Bacon's Abridgment, tit. "Mortgage," C: "Although the mortgagee may assume possession of ejectment at his pleasure, and according to the case of *Moss v. Gallimore*, 1 Doug. 279, may give notice to the tenants to pay him the rent at the time of the notice, yet, if he suffers the mortgageor to remain in possession or in receipt of the rents, it is a privilege belonging to his estate, that he cannot be called upon to account for the rents and profits to the mortgagee, even although the security be insufficient."

In *Higgins v. Building Co.*, 2 Atk. 107, Lord HARDWICKE thus states the law: "In the case of a mortgagee, where a mortgageor is left in possession, upon a bill brought by the mortgagee for an account in this court he can never have a decree for an account of rents and profits from the mortgageor for any of the years back during the possession of the mortgageor." And again, in *Mead v. Lord Orrery*, 3 Atk. 244, he says: "As to the mortgageor, I do not know any instance, where he keeps in possession, that he is liable to account for the rents and profits to the mortgagee, for the mortgagee ought to take the legal remedies to get into the possession."

The American decisions sustain this rule. So long as the mortgageor is allowed to remain in possession, he is entitled to receive and apply to his own use the increase and profits of the mortgaged estate; and, although the mortgagee may have the right to take possession upon condition broken, if he does not exercise the right, he cannot claim the rents; if he wishes to receive the rents, he must take means to obtain the possession. See *Wilder v. Houghton*, 1 Pick. 87; *Bank v. Reed*, 8 Pick, 459; *Noyes v. Rich*, 52 Mc. 115; *Clarke v. Curtis*, 1 Gratt. 289; *Beverly v. Brooke*, and *Same v. Scott*, 4 Gratt. 208, 209 *et seq.*; *Allen v. Gibson*, 4 Rand. (Va.) 468; *Gilman v. Telegraph Co.*, 91 U. S. 603, 617; *Teal v. Walker*, 111 U. S. 248, (4 Sup. Ct. Rep. 420.)

While it is not disputed, that this is the law, yet it is insisted, that it has no application, when the mortgaged

estate is a leasehold and not a fee-simple. The interest of the mortgageor, Hurd, in the Austen mines was a lease of five years; and it is argued by the counsel for the mortgagee, that this was but a right to use these Austen mines for five years. These funds derived from the use of the mines by Shaffer were not strictly speaking rents and profits. They represent the lease itself. It is all that is left of the thing mortgaged. The mortgaged premises being so converted into money, the mortgageors are entitled to the fund as the equivalent of the lease. When a tenant mortgages his crop, it cannot be said that this crop is rent, although it issues out of the land. But certainly a court of equity would preserve for the benefit of the mortgagee the fund, into which the crop has been converted.

The error in this reasoning is the assumption, that under Colgate's lease Hurd had simply the right to take the rents and profits of the Austen mines for five years; and that it was really these rents and profits for five years which he afterwards mortgaged. On the contrary what Hurd owned and mortgaged was a leasehold-estate in the land known as the "Austen Mines;" and whether it was a leasehold-estate or a fee-simple estate mortgaged, till the mortgagee takes actual possession of the estate, which he has a right to do, the rents belong to the mortgageor. It was so decided in *Mayo v. Fletcher*, 14 Pick. 525.

But there is another ground, on which the mortgagees in this cause insist, that they were entitled to the fund in court arising out of the issues and profits of the mortgaged estate. They admit, that the law is correctly stated by Judge BALDWIN in *Beverly v. Brooke* and *Same v. Scott*, 4 Gratt. 212. He says: "It is true that a mortgagee's right to receive the profits is an incident of his possession, and, if he permits the mortgageor or subsequent incumbrancers to retain the possession and enjoy the profits, he cannot recover them by action at law or suit in equity. But the appointment of a receiver is in the nature of an injunction, which defeats the mortgagee's power of election. He cannot take possession if he would. The court takes and preserves it for him until his right of priority is established. If he be a party to this suit, he has nothing to do but wait the decision of the contro-

versy, and receive the rents from the hands of the court."

It is certainly the general rule in a suit to foreclose a mortgage or to sell the mortgaged estate, to pay the debt secured by a mortgage, that the mortgagee has no claim to the rents and profits of the mortgaged estate, till it is taken possession of by a receiver appointed by the court; but it is insisted, that if in addition to seeking to foreclose the mortgage or to sell the mortgaged estate to pay the debt secured by it the bill seeks to subject the future rents and profits of the mortgaged estate to the payment of the debt secured by the mortgage, the court will apply such future rents and profits after the institution of such suit to the payment of the mortgage-debt, if it be necessary in order to satisfy the same; and such rents and profits after the institution of such suit do not belong to the mortgagee, nor are they subject to his control nor to that of any person claiming by through or under him. And the case of *Dow v. Railroad Co.*, 20 Fed. Rep. 768, is relied upon as sustaining this principle.

It was there held, that the mortgageor of a railroad, though the mortgage covers income, can not be required to pay the mortgagee for earnings, while the property remains in his possession, until a demand has been made on him therefor or for a surrender of the possession under the provisions of the mortgage. This was also in effect decided in *Railroad Co. v. Cowdrey*, 11 Wall. 459. If however the suit is not simply for the foreclosure of the mortgage or sale of the railroad to pay the mortgage-debt, but also that the mortgageor may be required to surrender the possession of the railroad, the mortgagee would be entitled to the earnings. The mortgagee, it was held in this case, was entitled to the income and profits of the railroad from the institution of the suit, and not from the time the receiver of the railroad was appointed some time afterwards. The ground of this decision was, that after the institution of such a suit the company or mortgageor wrongfully withheld the possession, and under such circumstances equity forbids, that it should retain as against the mortgagee the fruits of its refusal to do what it ought to have done. If it had done so, when the suit was brought, a receiver would have been unnecessary.

Upon the principles laid down in these decisions of the

Supreme Court of the United States, which seem to be sustained by good reason, it would appear to follow, that, if a suit was brought by a mortgagee not only to foreclose a mortgage-debt but also asking the court in the mean time to put the mortgagee in possession of the estate or to appoint a receiver and appropriate the rents and profits of the estate to the payment of the mortgage-debt, the mortgagee ought to have a right to have the rents and profits so applied from the institution of such suit and not from the time only, when a receiver was appointed and took possession of the mortgaged estate; for then the improper retention of the possession of the mortgaged estate by the mortgageor after the institution of such suit would be permitted to inure to the benefit of the wrong-doer, and equity forbids, that the mortgageor should retain against the mortgagee the fruits of his refusal to do what he ought to have done.

But it is claimed by the counsel of the mortgageor, that the cause before us was simply a suit to foreclose a mortgage or to sell the mortgaged premises to pay the mortgage-debt, and not either to obtain possession of the mortgaged estate, or to have it put into the hands of a receiver, and the rents and profits applied to the payment of the mortgage-debt. It is true, the bill was very imperfect, and its prayer was simply, "that the mortgaged estate might be sold, and the plaintiff's mortgage-debt be paid out of the proceeds of such sale, and for further and general relief." But Martin L. Shaffer was made a defendant to the bill. If the obtaining of this specific relief was the whole object of this suit, it was obviously improper to make him a defendant; for he was, so far as the bill showed, a mere agent or person claiming and holding possession under and for the mortgageor, Hurd, and he had, as shown by the bill, no interest in this suit and could only properly have been made a party defendant to it with the view of holding him responsible for the future rents and profits of the Austen mines, a part of the mortgaged estate, or of requiring him to surrender the possession of them, that they might be paid to the party entitled to them; and the counsel for the mortgagee claims, if this be so, that the general prayer for relief ought to be regarded as including in it a prayer, that Shaffer should surrender the possession of

the Austen mines to the mortgagee; or to a receiver of the court, or that he be regarded and treated as a receiver of the court.

The only allegation in the bill in reference to Shaffer is this: "The plaintiff further says that Martin L. Shaffer is now in possession of and operating the Austen mine lease by contract with said Hurd;" and the prayer of the bill is for the sale of the mortgaged property, and that out of its proceeds the plaintiff's debt as mortgagee be paid, and for such further and general relief as the court may see fit to grant. Upon this state of facts, the only relief, which could be granted against the defendant, Martin L. Shaffer, would be a decree directing him to surrender this Austen mine leasehold to a receiver of the court or to a mortgagee, or a decree treating him as a receiver of the court from the time the bill was filed (June rules, 1881) and requiring him to account for the rents and profits received pending the suit; and to such rents and profits upon the principles laid down above the mortgagees would be entitled. But they could not be entitled to the rents and profits received by Hurd or by Martin L. Shaffer, his agent, prior to the institution of this suit.

I do not think, that we do unreasonable violence to the meaning of the bill, when we regard the general prayer for relief against Shaffer as the equivalent of a demand for the Austen mines lease, so that the mortgagees may have the rents and profits of the same thereafter.

There is another and insurmountable objection to the validity of the claim of Jeffreys to this fund. He claims it by virtue of an attachment of these rents and profits of the property of Hurd, the mortgageor, in the hands of his agent, Shaffer. But when this attachment was served on Shaffer, August 11, 1881, these funds were under the control of the court in this chancery cause, it having been instituted May 19, 1881, and therefore not liable to be attached. After the institution of this suit no attachment could be levied upon the goods and affects, which were sought to be subjected in the suit, though they had not been taken actual possession of by the officer of the court. See *Hagedon v. Bank*, 1 Pin. 61. The principle underlying this law is, that after one

court has taken charge of property with a view of disposing of it according to the rights of all parties, no other court can interfere with it by seizing and disposing of the property under an order of attachment or any other order. See *Taylor v. Carryl*, 24 Pa. St. 259. From the moment the chancery court obtained jurisdiction over the property or funds, the power of another court to dispose of the property under an order of attachment or in any other manner is necessarily excluded. Now, when a chancery court can legitimately appoint the receiver of property or of a fund, it has the exclusive jurisdiction from the moment it is asked to appoint a receiver or to dispose of the property or fund, provided it subsequently appoints such receiver or disposes of the property. If the plaintiff in a chancery suit claims certain property or fund and asks legitimately the appointment of a receiver of the funds and makes defendants all persons having any claims to the fund, all persons, who set up any claim to the fund, must do so in such suit, and no subsequent suit can change the rights of any of the parties.

The suit before us was instituted May 10, 1881, by Childs, the mortgagee of the lease by Colgate to Hurd of the Austen coke-lands in Preston. The defendant in the suit was not simply the mortgagee, Hurd, but very many other creditors of Hurd,—all of his creditors according to the allegations of the bill, who had any lien on said mortgaged property, or any other property of said Hurd by judgment or in any other manner. By the decree of August 11, 1881, with the consent of all parties it was decreed, that this cause be referred to a commissioner of this court to ascertain and report all the property both real and personal of said Hurd in the State of West Virginia together with the liens thereon and their respective priorities.

In view of the character of the bill in this cause and especially in view of those, who are the defendants in said suit, and in view of the character of this consent-decree and of the fact, that its entry was consented to by said Jeffreys, it does not seem to me, that we ought not to regard this as simply a bill to foreclose a mortgage and sell the Austen coke-lands, but as having a far wider scope, including in the

objects of the suit the ascertainment of all the claims or liens on the rents, issues and profits of said Austen coke-lands in the hands of Martin L. Shaffer, as alleged in the bill, and the ascertainment by the Court of the rights of all parties to these rents, issues and profits. So regarding this bill, from the moment this suit was instituted, May 19, 1881, the determination of the person or persons who were entitled to these rents, issues and profits was submitted to the Court, and none of the defendants could thereafter acquire any new or additional claim to the same by issuing attachments for their claims, or in any other manner. For any other claimant would be a *lis pendens* purchaser, and by such purchase *pendente lite* could acquire no right against the original parties to the suit; for property or a fund so situated can not be attached, being really in the custody of the law.

This we regard as substantially the case before us. It is true, there was no direct claim in the bill of the funds in the hands or which might come into the hands of Shaffer by the mortgagee of the property, out of which the fund arose or would arise. But the plaintiff stated in the bill, that this mortgaged property was in the possession of Shaffer, an agent of the mortgageor, and the suit, as we have seen, sought the decision of the Court as to who were the lienors on all the property of the mortgageor real or personal, including of course those rents and profits in the hands of Shaffer, and their priorities.

When this suit was instituted the Chancery Court of Taylor county acquired jurisdiction in the cause to pay out the funds in Shaffer's hands, or which might come into his hands from the Austen coke-mines, the mortgaged property, to the parties entitled thereto, and neither Jeffreys nor any party to this suit could acquire precedence of right to this fund by subsequently suing out an attachment against the mortgageor, Hurd. I am therefore of opinion that Jeffreys's attachment gave him no additional right to the fund, which came into the hands of Shaffer.

The Austen Coke Company's claim to this fund is based on an assignment of the Austen mines lease by the mortgageor, Hurd, on January 15, 1881, which preceded the institution of this suit and was also some twenty days prior to

the issuing of the attachment of Jeffreys against said Hurd. Its claim would be apparently better than that of Jeffreys to said fund, arising from the product of said Austen mines lease, provided this assignment of the Austen mines lease to the Austen Mine Company was for a valuable consideration and *bona fide*; but in the said cross-bill of Jeffreys this assignment is charged to be fraudulent, voluntary and void as against the creditors of said Hurd. The allegations in this cross-bill on this point are as follows:

The plaintiff is informed, and he accordingly alleges, that on January 15, 1881, about ten days after he had put his agent, Shaffer, in charge of the Austen mines, the defendant Hurd, who was then utterly insolvent and worthless, appointed with himself two other persons, under chapter 40 of the Laws of New York State, passed in the year 1848, and the several laws of the State of New York subsequently made by way of amendment thereof, and formed two distinct joint-stock corporations,—the same three persons being the only incorporators and trustees of both corporations, one being called the “Alleghany Iron & Coke Company;” the other being called the “Austen Coke Company;” both having their principal office in the city of New York,—for the purpose of conveying and assigning to these two corporations all the property owned by him, including the Austen mines, with intent to hinder, delay, and defraud the plaintiff and his other creditors in the collection of their claims against him. That the certificates of the formation of both these corporations were signed, made, and acknowledged on the same day, January 14, 1881, before the same notary public; and at the same time, on the next day, they were both filed in the office of the clerk of New York county, in the State of New York. That no duplicates of either certificates were ever filed, as required by law, in the office of the comptroller of the treasury of the state of New York; nor has either corporation ever filed in the office of the clerk of the county of New York any annual report; nor has either corporation ever made any report to the comptroller of the treasury of the state of New York,—both of which last-named two reports are by law required to be made annually, under oath; nor has either corporation ever had, or pre-

tended to have had, any principal office or place of business whatever; nor has either corporation ever had, or pretended to have, any principal office or place of business in New York city, or kept, or pretended to keep, any stock-book, as required by section 25 of chapter 40 of the Laws of New York for the year 1848; nor did either of said companies file with the secretary of state of West Virginia on or before January 15, 1881, a copy of the articles of association, or of the law or authority under which they were incorporated; nor was a certificate issued to either of said corporations by the secretary of state, or recorded by either of said corporations in any county in West Virginia; nor did either corporation place or file in the county clerk's office a copy of its articles of association, nor do any of the things required by the laws of West Virginia to be done by foreign corporations. On January 15, 1881, and at the same time, said Hurd executed, with intent to hinder, delay, and defraud the plaintiff and his other creditors, the following three assignments in writing; that is to say: One to the Alleghany Iron & Coke Company of all his property of every kind, situated on and including certain leasehold-premises in Taylor county, W. Va., conveyed to him by F. Leon Clerc, consisting of iron ore mines of a value of many thousand dollars; one to the same corporation of all his property of every kind, situated in and including certain leasehold-premises in said county of Taylor, conveyed to him by Alfred J. Ulman, whereon for two years he had carried on a large blast iron furnace for making pig-iron, of the value of many thousand dollars; and one to the Austen Coke Company of his property of every kind situated on and including said Austen mines property, in Preston county, W. Va., of the value of many thousand dollars. These three assignments were made at the same time, and attested by the same witnesses; were acknowledged by said Hurd, at the same time, before the same notary public; and they, with the two certificates of incorporation, constitute one and the same transaction, and constitute together part of the fraudulent scheme carried out by said Hurd to hinder and delay his creditors. That the said two companies were neither of them in existence when said assignments were executed by said Hurd."

The following is a copy of this assignment to the Austen Coke Company :

“Know all men by these presents, that I, Charles S. Hurd, of Iron-ton, West Virginia, party of the first ———, for and in consideration of the sum of one dollar and other good and valuable consideration, lawful money of the United States, to me duly paid by the Austen Coke Co., have sold, and by these presents do grant, convey, assign, and transfer and set over, unto the said Austen Coke Co., the indenture of lease bearing date the second day of January in the year one thousand eight hundred and seventy eight, made by Samuel Colgate, of Orange, county of Essex, state of New Jersey, of the first part, and said Charles S Hurd, of Iron-ton, county of Taylor, state of West Virginia, of the second part ; the same being witnessed by Augustus P. McGraw. Said lease covers about two thousand acres of coal land in Austen, county of Preston, state of West Virginia, and other property, with all and singular the premises therein mentioned and described, and the buildings thereon, together with the appurtenances,—to have and to hold the same unto the said Austen Coke Co., or its assigns, from the fifteenth day of January, 1881, for and during all the rest, residue, and remainder yet to come of and in the term of seven and one-half years mentioned in said indenture of lease ; and I hereby sell, assign, and transfer to said Austen Coke Co. all the tools, machinery, mules, and personal property of any and all kinds belonging to me now on said premises, or used in working said mines ; subject, nevertheless, to the rents, covenants, conditions, and provisions therein also mentioned ; and I do hereby covenant, grant, promise, and agree to and with said Austen Coke Co. that the said assigned premises now are free and clear of and from all former and other gifts, grants, bargains, sales, leases, judgments, executions, back rents, taxes, assessments, and incumbrances whatsoever, except one mortgage, made by the party of the first part to J. S. Brown and A. H. Childs, to secure twelve thousand dollars, and one to A. H. Childs, to secure any balance due to him on account. In witness whereof I have hereunto set my hand and seal this 15th day of January, one thousand eight hundred and eighty-one. CHARLES S. HURD. [Seal.]”

Charles S. Hurd in his answer says: "The Austen Coke Company was duly and fully organized under the laws of the state of New York, and has been duly authorized to transact and carry on business under the laws of West Virginia, having fully complied with the statute relating to foreign corporations; that this respondent does not constitute said company, and is not authorized to act for it; that the assignment of the lease of Samuel Colgate to respondent, dated January, 1878, and by respondent to said Austen Coke Company, was made in perfect good faith, and for a valuable consideration, and this respondent has no further interest therein. Respondent further says that it is not true that said Martin L. Shaffer holds possession of such leasehold premises under this respondent. Said Shaffer holds under and by an arrangement with said Austen Coke Company, and is accountable to and should account to it alone."

In the answer of the Austen Coke Company the allegation, that there is no such company as the Austen Coke Company, but that it is an assumed name for said Hurd, is flatly declared untrue. Said answer avers, that on the contrary, the Austen Coke Company is a corporation duly organized and chartered under the laws of the state of New York and fully authorized to do business within the state of West Virginia, as will appear by the certificate of Randolph Stalnaker, Secretary of State, a copy of which is filed. The certificate is dated August 25, 1881, and was recorded in Preston county August 25, 1881. The certificate is, that on August 25, 1881, said company filed in the office of the Secretary of State a copy of the law, under which they are incorporated. The evidence showed, that there were stockholders in said company, who became *bona fide* stockholders in the spring and summer of 1881, and who proved in a general way the truth of these general allegations in these answers. But there was no proof as to the consideration of the assignment by Hurd of this Colgate lease of the Austen mines to the Austen Coke Company. But from the evidence in the cause the inference to be drawn is, that no money was paid to Hurd to obtain this transfer, and that he organized said Austen Coke Company and transferred to it the Colgate lease and the Austen mines property under the expectation

that after the organization of the company enough stock of the company could be sold to furnish the corporation with funds sufficient to pay off the debts due from said Hurd on account of said Austen mines property, and successfully carry on the coking business at said mines. But, while Hurd hoped to do this by the organization of these companies, he was disappointed in this expectation. These corporations after their organization disposed of but a few shares of their stock to *bona fide* purchasers. The assignment of Colgate's lease by Hurd to the Austen Coke Company is dated January 15, 1881, and professes to be "in consideration of the sum of one dollar and other good and valuable considerations, duly paid to the said Hurd by the said Austen Coke Company."

The cross-bill charges that this Austen Coke Company never had any existence. But, though there are many acts required by the laws of New York as well as the laws of West Virginia, to be done by every corporation which this company is not shown to have done, and though by its failure to perform these required acts it may have forfeited its charter, yet these causes of forfeiture cannot be taken advantage of in this suit, nor enforced against the Austen Coke Company, a private corporation, collaterally or incidentally or in fact in any other manner than by a direct proceeding for that purpose against it, which it would have the opportunity to answer. The State alone can institute such a proceeding, and, as the charter of the corporation is a compact with the State, it may like an individual waive a broken condition of the compact and not enforce the forfeiture. *Lumber Co. v. Ward*, 30 W. Va 43, 49, *et seq.* (3 S. E. Rep. 227). While, then, the court was bound to regard in this suit the Austen Coke Company as an existing corporation, yet it was then in this case required to do more, and to ascertain when it came into existence; for it is claimed by the appellant, that it came into existence subsequently to the assignment to it by Hurd of this Colgate lease of the Austen Coke Company mines property, on January 15, 1881, and that therefore this assignment was a nullity; and this position is apparently sustained by the evidence.

The laws N. Y. 1848, §§ 1, 22, required the certificate of every company to be filed with the clerk of the county, in

which the business shall be carried on, and that a duplicate thereof shall be filed in the office of the Comptroller of the Treasury of New York. Whenever this is required by statute, as it is in many States, it is properly held, that the filing of this original certificate with the clerk is an indispensable prerequisite to the creation of the corporation, and that, until this has been done, it has no existence; and that may be shown incidentally and taken advantage of collaterally, whenever the fact of incorporation is in any form called into question. See *Mining Co. v. Woodbury*, 14 Cal. 425. By the wording of the New York statute as well as that of other states the filing of this certificate in the proper offices must occur, before any of the rights and privileges of a corporation are conferred. See, also, *Abbott v. Smelting Co.*, 4 Neb. 416; *McIntire v. Association*, 40 Ind. 104; *Mining Co. v. Herkimer*, 46 Ind. 142; *Doyle v. Mizner*, 42 Mich. 332, (3 N. W. Rep. 968.); *Field v. Cooks*, 16 La. Ann. 153. I have found no decision of the New York court of appeals on this point, but the Court of Common Pleas of New York City has decided, that under the New York law the filing of the certificate of incorporation in the office of the clerk of the county, though not the filing of the duplicate in the office of the comptroller of the treasury, is an essential prerequisite to the existence of the corporation; and this we must hold to be the law of New York both on reason and authority. See *Raisbeck v. Oesterricher*, 4 Abb. New Cas. 444.

The cross-bill of Jeffreys expressly charges, that the certificate of incorporation of the Austen Coke Company was signed, made and acknowledged before a notary public on January 14, 1881, and on the next day it was filed in the office of the clerk of the county of New York in the state of New York, and that no duplicate of this certificate of incorporation was filed in the office of the clerk of New York county. On January 15, 1881, Hurd executed this assignment of all property of every kind comprising the Austen mines property in Preston, including said lease of the Austen mines. It is denied that this assignment was made without valuable consideration, to hinder, delay, and defraud the creditors of said Hurd; but there is no denial of the express charge in the cross-bill, that this assignment was made be-

fore the certificate of incorporation of said company was filed in the clerk's office of the county court of New York. This charge therefore must be regarded and treated as admitted to be true. There is not a particle of evidence on this point and nothing to show, when this assignment was executed by Hurd, except simply the date of it, January 15, 1881; and, as the certificate of the incorporation of the Austen Coke Company was filed in the office of the clerk of the county of New York on that day, of course this is entirely consistent with the admission, that this assignment was executed first and before the filing of this certificate in said clerk's office, and therefore before the assignee in the assignment, the Austen Coke Company, had any existence; for under the laws of New York we have seen, it had no existence, until this certificate of its incorporation was filed with the clerk in his said office in the county of New York.

This of course rendered the assignment null and void, if it had not been made to hinder, delay and defraud the creditors of the assignor. But it was so made. The plaintiff in this cross-bill alleges, that, before this assignment was made, this corporation owned no property whatever, and could not and did not pay to said Hurd any consideration whatever for the property so assigned to it; that by these assignments said Hurd utterly divested himself of all property owned by him and became thereby utterly insolvent, and has continued so ever since. There is a denial of the truth of this allegation in the answer of the Austen Coke Company; but there is no statement of what was the consideration paid by the Austen Coke Company for said assignment by Hurd to it, and nothing to prove any consideration except the recital in the assignment, that it was for one dollar in hand paid and other valuable considerations. All that the answer says on this subject is, that on the 15th day of January, 1881, it became the purchaser for a good and valuable consideration of the interest of Charles S. Hurd, its co-defendant, in certain leasehold property at Austen in Preston county, W. Va., known as the "Austen Mines & Coke Company," "conveyed to said Hurd by said Colgate under written lease of January 2, 1878." The cross-bill having charged that this assignment was voluntary and for that reason void as against the plaintiff

and other then existing creditors of the said assignor, under the settled law of this State the recital in this assignment of the payment of the consideration for the property is not evidence of such payment or consideration as against the existing creditors of the assignor, who are assailing such assignment as voluntary and therefore fraudulent as to existing creditors. See *Cohn v. Ward*, *supra* p. 34. See, also, *Rogers v. Verlander*, 30 W. Va. 619, (5 S. E. Rep. 847), and *Knight v. Capito*, 23 W. Va. 689.

In such a case, the burden of proving, that the deed or assignment was made for a valuable consideration rests upon the grantee or assignee; and this burden the Austen Coke Company has failed to meet, and the Court below therefore did not for these reasons err in regarding as null and void this assignment in the decrees of which the appellant complains.

The Austen Coke Company's claim to this fund paid into Court by Shaffer was worthless. This fund being the proceeds of the Austen coke mines, which was by this void assignment attempted to be assigned to the said Austen Coke Company, Samuel Colgate by his counsel claims, that he is entitled to \$5,420.50 of this fund, that being the amount due from said Hurd under his lease to said Colgate of said Austen mines property, as royalty for coke taken from said property by the lessee, Hurd, and not paid by said Hurd to the lessor, Colgate. This lease was for 2,000 acres of land, with the privilege of working coal-mines on said land, and run for five years from May 1, 1878, the coal mines then already opened, with the buildings erected, levels, drifts, road-works, engines fixed, machinery, fixtures and all other things on said premises used for getting coal from under said land and coking the same, "yielding and paying during said term of five years the royalty of ten cents for every ton of coal, which shall in any year be gotten out of the said premises, to be paid quarterly within thirty days next after the close of the quarter year;" and by said lease it was agreed that, "whenever any part of said rent and royalties shall be in arrear for the period of thirty days after the same shall have been duly demanded, the party of the first part, Samuel Colgate, may enter into and distrain upon said mines and premises

and coal and dispose of the same in due course of law as landlord."

This lease gave to the landlord, Samuel Colgate, a lien on all the coal mined on said land to pay his royalty when due and demanded. The fund paid by Shaffer into the court in this suit was the product of the coal mined on said land during the continuance of this lease. The claim set up by Samuel Colgate in this suit to be paid his unpaid royalties was such a demand as gave him a complete and first lien on the proceeds of the coal in the hands of the court, to be paid the entire amount due to him for royalties which remained unpaid. This amount was ascertained in the suit, and the court below ought to have had it first paid out of the moneys in the hands of the receiver in the cause and paid into the court by said Shaffer as the first lien upon the same.

But it is claimed by counsel in this court, that Samuel Colgate is entitled to nothing on account of unpaid royalty under this lease, because said Hurd, the lessee, had constructed some twenty new coke-ovens on the leased premises at a cost of more than \$4,000.00. which at the expiration of the lease would add largely to the value of the leased premises, which would inure to the benefit of Colgate, and therefore the value of these new coke-ovens should be deducted or set off against the amount due Colgate, for royalty. This position cannot be maintained. In the lease of Colgate to Hurd is the following provision: "The party of the second part, said Hurd, may remove for his own benefit all engines, machinery, and fixtures he shall have erected and set up on the said premises or any part thereof; first giving the party of the first part, said Colgate, the option of purchasing the same, or any part thereof, at a fair valuation." The law regards with peculiar favor the right of tenants to remove articles annexed by them to the freehold and extends much greater indulgence to them in this respect, than it concedes to some other classes of people. See *Thomas v. Crout*, 5 Bush, 37; *Wall v. Hinds*, 4 Gray, 256; *Elwes v. Maw*, 3 East 38, 2 Smith, Lead. Cas. (7th Amer. Ed.) 212, 228, notes.

Under the provision in the lease above cited there can be

no question, but that the lessee, Hurd, could have removed the new coke-ovens, which he put on this land and premises during the continuance of the lease, and it might have been extended to such further period, as the tenant continued to hold possession as tenant. See *Weeton v. Woodcock*, 7 Mees. & W. 14. But there was no possession here by Hurd or his assignee as tenant after the expiration of his five-years lease, and as tenant he would have no right to enter on the premises after the expiration of his time for the purpose of removing these coke-ovens, which he had put there, or any other fixtures. See *Leader v. Homeward*, 5 C. B. (N. S.) 546. When the tenant quits the premises leaving his fixtures behind him, it will be presumed, that he intended to abandon them. See *Penton v. Robart*, 2 East 88; *Dubois v. Kelly*, 10 Barb. 496; *Connor v. Coffin* 22 N. H. 541.

It is however insisted by the counsel for the appellee, Jeffreys, that this claim of Colgate for unpaid royalty was not proven and was therefore properly rejected. It was proven by Jessup, that Shaffer, said Hurd's agent, mined on these leased premises after January 1, 1881, in all 54,205 tons of coal, the royalty on which at ten cents a ton would be \$5,420.50. Jessup kept for Shaffer an account of mining of coal and manufacturing of coke, so that his statement of the quantity of coal mined at these Austen mines, which were in the possession and under the control of Shaffer as agent for Hurd, the lessee, is important; and he states, that no royalty for any of this coal so mined after January 1, 1881, was ever paid to Colgate. This evidence satisfactorily establishes Colgate's claim.

Another ground for rejecting this claim is urged by counsel: that none of the commissioner's reports allowed this claim, and that Colgate did not except to any of these reports but abandoned his claim, if he has ever had any. He must be held to have acquiesced in these reports, which ignored his claim by failing to report it. See *Thompson v. Catlett*, 24 W. Va. 525; *Chapman v. McMillan*, 27 W. Va. 220. The first of these reports was made under an order of reference, which directed the commissioner to ascertain and report all the property real and personal, belonging to said Charles S. Hurd in the state of West Virginia together with the liens

thereon and their respective priorities. Though the bill had stated, that the coal-mines had been worked since January 1, 1881, by Shaffer for the lessee, Charles S. Hurd, yet neither the commissioner nor any of the parties nor their counsel understood this order of reference as directing the commissioner to ascertain, what moneys were in the hands of Shaffer belonging to said Hurd, and he accordingly made no report on this subject. It is by no means clear, that the commissioner did not properly interpret the order of reference; but, whether he did or did not, his failure to make any report on the subject of this fund in the hands of Shaffer certainly would not forfeit the claim of Colgate to this fund or some part of it, because he did not insist upon his claim being reported. He had nothing to except to but the failure of the commissioner to report on this subject, and if it was an abandonment of his claim to any part of this fund, as no exception was filed by any party to the commissioner's report because of this omission, all the parties to this suit, including Jeffreys, must be for the same reason regarded as abandoning all claim to this fund. This is an absurdity; and in truth none of the parties, in order to preserve their claim to this fund, were under any obligations to except to the commissioner's report because of its failure simply to make any report on this subject.

This report was recommitted to the commissioner with express directions to make settlement of the accounts between the defendant Albert H. Childs and said Charles S. Hurd, but with no directions to settle the accounts of Martin L. Shaffer as agent of Charles S. Hurd, nor with any directions to ascertain the amount of the fund in the hands of said Shaffer, and to whom it should be paid. There was in this report of the commissioner under this order of reference no allusion to this fund in the hands of Shaffer, and no exception to the report on this account by Colgate or any one else, and no necessity for such exception in order to prevent the forfeiture of their claim to this fund or any part thereof.

But on November 20, 1885, on the motion of Samuel Colgate, "this cause was recommitted to the commissioner to ascertain and report to the court what sums, if any, remained unaccounted for to said Colgate of the royalty of ten cents

per ton of coal mined and reserved to him in his lease to the defendant, Hurd, dated January 2, 1878, and what sums of money have been expended by M. L. Shaffer on said leasehold by permanent improvements in addition to ordinary repairs and necessary repairs, and at what time; and said commissioner shall certify all the evidence and facts upon which this report and also the report of November 4, 1885, is based, and also from what source the funds in said Shaffer's hands were derived." His report was made October 15, 1882, and was, that Martin L. Shaffer filed a statement of his accounts showing that on the 1st day of May, 1883, there was in his hands as follows :

Total amounts of receipts from coke and coal.....	\$74,908 84
Total disbursement.....	68,165 73
	<hr/>
	\$6,743 11

Then follows in the report a minute statement of the personal property, which was on hand the 15th of January, 1883, the time said Shaffer took possession of the Austen coke and coal mines, and then a list of uncollected claims for coke and coal amounting to \$2,695.92; and he reports that no rent had been paid on the store-room occupied by Shaffer since December 13, 1879. This was the whole of this report.

There was no ascertainment of the liens or claims on this fund in the hands of Shaffer and no exception to the report because of this. The commissioner and the parties not having regarded it as required to be stated by the decree of reference, clearly neither Colgate nor any one else can be regarded as having forfeited or abandoned any claim to this fund, because the commissioner failed to report on the claims of any of the parties to this fund.

This report was recommitted to the commissioner at the November term, 1885, with directions to "ascertain and report, what sums, if any, remained unaccounted for to the said defendant Samuel Colgate of the royalty of ten cents *per ton* of coal reserved to him in his lease to the defendant Hurd, dated January 2, 1878, and what sum or sums of money have been expended by M. L. Shaffer on said leasehold premises by way of permanent improvement in addition to ordinary and necessary repairs, and at what time, and also to certify

all the evidence and facts on which his previous report was based, and also from what source the funds in Shaffer's hands were derived."

In this report the commissioner re-stated the balance in the hands of Shaffer, corresponding with his former report, and he stated, that there was in his hands the proceeds of the sale of three mules, \$300.00; and that he was responsible for rent of the store-house on leased premises from January 13, 1881, to May 1, 1883; but there was no evidence in the cause showing the amount of said rent. He submits to the court the question, whether Shaffer should pay any interest on the funds in his hands. The following is the report in reference to the claims to this fund:

"Statement of the liens upon the funds in the hands of Martin L. Shaffer:

"First in priority:

Childs and Brown, monthly balance, March 1, 1881.....	\$1,838 09
Interest March 1, 1881, to November 4, 1885.....	515 58
	<hr/>
	\$2,353 67

"Second in priority:

Albert H. Childs.....	\$4,096 10
Interest 1st June, 1881, to November 4, 1885.....	1,246 81
	<hr/>
	\$5,942 91
	<hr/>
	\$8,266 58

"For evidence of the two foregoing claims see deposition of Albert H. Childs, and commissioner's report No. 2, filed in this cause the 11th day of February, 1882. After the payment of the above two claims the Austen Company is entitled to any balance remaining in the hands of said Shaffer.

"Special matter reported at the instance of the Austen Coke Company:

- (1) The amount paid out by Shaffer for permanent improvements or building new ovens..... \$6,215 61
- (2) Amount applied of the profits of the mines and sale of coke to the payment of Martin L. Shaffer's debt.. \$1,047 50
- (3) Amount paid to miners, laborers, etc., assigned to Martin L. Shaffer, and paid by him out of the mines and coke..... \$2,814 48'

There was no exception filed to this report by Samuel Colgate, but the court in acting upon it ordered, that this cause be recommitted to the commissioner, who shall ascertain

and report certain specified things; also the amount in the hands of the said Martin L. Shaffer as agent and manager of the Austen Coke Company; that he also report any property of said Hurd besides said leasehold estate, upon which the various judgments and attachments against said Hurd are liens, and the priorities thereof, and any other matter deemed pertinent or required by any of the parties. The commissioner on March 9, 1886, made his report, in which he said:

"No evidence was produced before your commissioner in reference to Samuel Colgate's royalty, upon which to base a report." He reports all the evidence, on which his former report was based, to the court, and states: "No oral testimony was taken before me," and he sends up and refers to all the written testimony, on which his last report is based. The depositions of Jessup and Shaffer, before referred to, were sent up with this report.

Samuel Colgate did not except, on account of the failure to report the amount of royalty due him under his lease of the Austen mines property to said Hurd, as specially required by the order of reference. I can not conclude, that this failure to except can be regarded as an abandonment by Samuel Colgate of his claim to royalty. This simple failure to report the amount due on this royalty reserved can not be regarded as the equivalent of a report that nothing was due thereof. If this had been the report on this order, and it had not been excepted to by Samuel Colgate, it would have been properly held as acquiesced in by him, and his claim of royalty would have been regarded as abandoned. But as there was no such report against this claim set up in Colgate's answer and proved satisfactorily to exist, the court ought to have recommitted the cause to the commissioner and required him to report the amount of this claim; or it should from the evidence in the cause have ascertained, as it easily could, the amount of this claim and decreed it to be paid first out of the funds, which had been paid into the court by Shaffer.

If Jeffreys has not a claim to this fund by reason of his attachment, his claims by reason of his having filed a cross-bill in the nature of a foreign attachment it can not be sus-

tained. This fund was paid into the court on November 20, 1885, and the attachment on this cross-bill filed by Jeffreys did not issue for some time thereafter,—that is, on the 30th of June, 1886,—so that these funds being unquestionably in the hands of the court were not subject to an attachment by Jeffreys.

This suit cannot justly be regarded simply as a suit to foreclose a mortgage. The parties, as well as the court below, always evidently regarded it as embracing much more than a simple foreclosure of a mortgage. This is shown by the fact, that Shaffer, the mortgagee, was an agent of the mortgageor and was made a party to the cause, which ought not to have been done, had the suit been simply to foreclose a mortgage. He was obviously made a party defendant in order to make him account for the funds of the mortgageor, which he had received as the manager of the mortgaged premises. All the lien-creditors of every description were made defendants. This would obviously have been improper, if it had been a suit simply to foreclose a mortgage. See *Mooreland v. Metz*, 24 W. Va. 119. The court by a consent decree, referred the cause to a commissioner to ascertain all the property of the mortgageor, real and personal, and all the liens on it and their respective priorities; and this was accordingly done. This shows, that no one in the court below regarded this a suit simply to foreclose a mortgage; and yet this is insisted on as the character of this suit.

That the court below should have ascertained the true amount of royalty due to Colgate under his lease and directed its payment out of the fund in the hands of the receiver, which was paid into court by Shaffer and was derived from the mining of coal on said leased premises, was a sequence from the course it did pursue. It set aside the sale of the mortgaged premises at \$5,000.00 on an upset bid of \$5,500.00 and ordered a re-sale. These premises were a lease for five years, which was of course diminishing in value rapidly every year, as the purchaser could by his purchase obtain the premises only till the termination of the lease. But the court and its officers were so dilatory in the making of this re-sale that the lease expired before it was made. Of course the mortgage then was obviously of no value, and the

parties, who had offered the \$5,500.00 as an upset bid to the court, refused to make this or any other bid; and the court instead of holding them to their bid by its final decree of November 16, 1881, discharged them from any liability thereon. This would seem to be but just to them; and if, as we hold, the net rents, issues and profits of the leasehold premises paid into court by Shaffer were to be distributed as the proceeds of the lease, if sold, would have been, then no one will sustain any loss from this failure of the court to have this leasehold property sold; for though it was worth \$5,500.00, yet those entitled to the money, it would have sold for, according to our views will get in lieu of its salable value the net profits from the use of said leasehold premises up to the termination of the lease. If however they are entitled, as the appellants insist, to no part of these net profits in the hands of the court, then they have suffered a loss of \$5,500.00 by reason of the court's failure to re-sell the property promptly, and the release of those, who offered the upset bid, from all liability therefor.

The counsel for the mortgagees insists that the parties, who offered this upset bid of \$5,500.00, ought, though the lease had expired before the re-sale, to be required to pay this sum. If this had been simply a bill to foreclose this mortgage, there might have been much reason in this view. If this \$5,500.00 was to be a clear loss, it would seem more just, that it should fall on those, who had produced it by making the upset bid, rather than on the mortgageors; but if, as we think, the net rents and profits of this lease can be substituted in effect in this case for the lease, then there would be no such clear loss of \$5,500.00 and no necessity to impose it on the parties, who had offered this upset bid.

One of the appellees, Ulman, by his counsel complains of errors against him in the court below. To understand his complaint it is necessary to state briefly his connection with the matters in controversy in this suit, as shown by the record. Commissioner Dent in one of his reports makes an accurate statement of a portion of these facts thus:

"For the assistance of the court your commissioner gives the following history of certain matters connected with the case: Some time in the year of 1874, Sinsheimer, Joseph

Rittenberg, and S. L. Adler were the owners of the furnace property known as the 'Lancaster Furnace Property,' and were running said furnace, and, being in need of funds, they borrowed of Joseph Ruck fifty thousand dollars, and executed a deed of trust on said land to Isador Raynor, trustee, to secure said sum of money. After the execution of said trust-deed the Lancaster Furnace & Mining Company was incorporated, and said land conveyed by said Sinsheimer, Adler, and Rittenberg to said company, subject to said trust-deed; and afterwards, on December 21, 1874, said Lancaster Furnace & Mining Company executed a second deed of trust on said real estate, and all their personal property situated on said premises, to Jacob Krauss, to secure certain notes executed by said furnace company for the sum of \$44,800.00. Said Krauss, the trustee, became the owner of said notes, and took possession of said furnace, and ran the same for ninety days. Said indebtedness of said furnace company to said Krauss seems to have been reduced to \$15,000.00. Said company was largely indebted to the men employed about said works, and it executed another deed of trust to Samuel Fernheim to secure said employes. Said employes assigned their claim to George Heller, who instituted a suit in chancery, and levied an attachment on all of said property. Said Heller obtained judgment against said company in the Circuit Court of Taylor county in said chancery suit, but the court failed to ascertain and settle the priorities on said property, and reserved its decision upon all questions in relation to said property, but gave Heller leave to sue out execution, which he did, and levied upon all the personal property. Jacob Krauss filed his answer in said suit, praying an injunction to said execution, which was granted. Said injunction was never perpetuated, and said chancery suit was continued from time to time, and in 1879 was dismissed, (all parties being tired.) In the mean time Isador Raynor, trustee in the first trust-deed, sold said real estate to Alfred J. Ulman, and Ulman took possession, the personal property still being on said premises; and Raynor's trust-deed did not cover the land upon which the railroad was situated, hereinbefore reported as the Lancaster Furnace & Mining Company, because said property was acquired by said company

after the making of said deed. Neither is the said strip of land included in the Krauss deed of trust. Said Krauss deed of trust was never executed, and Krauss took possession of said property, and treated it as his own. He subsequently left said premises, and removed out of the state. He afterwards sold his interest in said property to Charles S. Hurd, who leased the land of Ulman, and took possession of the personal property, and ran the furnace until the fall of 1880, when he suspended operations. In the mean time he had charged said property with the liens hereinbefore reported, except the execution liens, which were acquired by after-recovered judgments. On July 1, 1878, Ulman leased this Lancaster furnace tract so purchased of the trustee Raynor, and the Holland tract adjoining it, to C. S. Hurd for one year. This lease was afterwards extended to January 1, 1884, and Hurd gave mortgages on this furnace-property sought to be foreclosed in this suit."

This statement will suffice to enable us to understand the counter-assignment of error made by the council for Alfred L. Ulman, one of the appellees. It is as follows: "Alfred L. Ulman, one of the appellees, by way of counter-assignment of error against him in said decree, suggests and relies upon the follows: He is the owner of the tract of land upon which said furnace was built, having bought it at the trustee's sale. About onethird of said tram railway is located on appellee's land. Of the other twothirds, one is upon the Armstrong land, and the other upon the Rosset land. Said tram railway was built for the use of the furnace, and is as much a part of the furnace as any other machinery, and is therefore real estate,—a fixture,—and was bought by appellee with the furnace at the trustee's sale. *Second.* The property at the furnace sold by Constable Blue, under the distress in favor of this appellee, was the property of Hurd, and subject to the warrant. It was error to require the proceeds of this sale to be paid to Browning."

It is true, that Krauss had a lien upon this property, before Ulman leased it to Hurd; but Hurd bought Krauss's lien and afterwards sold or assigned it to Browning. Now, if the property were still in the hands of Hurd, it is plain, that Ul-

man would have a lien for his rent, and Hurd could not defeat this lien by selling the property then on the lessor's premises without providing for at least one year's rent. Code c. 93, s. 12. The facts stated in these assignments of error are supported by the evidence in the record. The deposition of Charles E. Hooper, a deputy-sheriff of Taylor county, also proves, that he had in his hands an execution in favor of George Heller against the Lancaster Furnace & Mining Company dated January 4, 1881, for \$3,684.36 with interest from 1875 and \$45.55 costs; that he levied this execution on two and a half or three miles of railroad iron and some other personal property belonging to the Waldorf furnace, which C. S. Hurd had been running in part on said land leased by said Ulman to said Hurd. On June 20, 1881, this deputy-sheriff under this execution sold this railroad iron to John W. Mason and John S. Herr for \$1,850.00. This railroad iron was levied on as the personal property of the Lancaster Furnace & Mining Company under the order of said Mason, its attorney, to whom the net proceeds of the sale was paid. The court below was of opinion and decided, that the railroad, so far as it was on said lease land, was included in the mortgage executed by said Hurd to E. S. Browning, and the proceeds of it should have been paid to him as the party having the first lien thereon, and that it had been erroneously regarded by the deputy-sheriff as the property of the Lancaster Furnace & Mining Company; and it was accordingly decreed, that said Heller do pay to E. S. Browning the net proceeds of the sale of the railroad iron, which had been so paid to him by said deputy-sheriff in extinguishment to that extent of said Browning's claim on said Hurd secured by said mortgage.

The propriety of this decision by the court below is called in question by these counter-assignments of errors. Browning claims under an assignment to him by Hurd of a mortgage, which had been assigned to Hurd by one Krauss. This mortgage was dated December 22, 1874, and was executed by the Lancaster Furnace & Mining Company to Krauss to secure a loan, and it was upon the land, on which said company had built in part said railroad; and on the 15th of May, 1879, said Hurd had conveyed certain personal property and

the railroad iron on said railroad running from said furnace to Iron-ton by a mortgage to secure a debt. If this iron on this railroad be regarded, as the counsel for Ulman in this counter-assignment of error insists it should be regarded, as real estate, then Ulman became the owner of it, when the trustee, Raynor, conveyed this furnace-tract of land, on March 11, 1876. But he leased this land and railroad to said Hurd till January 15, 1884, and Hurd gave a mortgage on said railroad to said Browning, and in addition thereto said Hurd assigned another mortgage on said furnace-tract, which would include the railroad iron given by the Lancaster Mining Company to said Browning. It would seem therefore, that, if this said railroad track be regarded as real estate, as Ulman's counsel claims, he has no claim to the proceeds of the sale of this railroad track on this furnace-tract, as it had by mortgages passed to said Browning; and the Circuit Court properly held, that he (Browning) was entitled to the proceeds, so far as they were on this furnace-tract but no further, and ordered their payment to him. There is therefore no foundation for the first counter-assignment of error by said Ulman.

Nor is the second assignment of error well founded. The constable, Blue, sold under execution in November, 1881, various articles of personal property used in connection with this furnace-property, which were fixtures, which had with this property been mortgaged by Hurd to secure a debt to said Browning. This personal property included in said mortgage fixtures, which were sold for \$678.15, and the money was brought into court by said Blue, to be disposed of by the court in this suit by directing its payment to the party entitled to it. The proceeds of said sale were directed by the court to be paid to said Browning. It was clear, that the claim of Browning by reason of his mortgage was prior and superior to that of the execution-creditors. But said Ulman gave the constable notice, that he had a claim for \$750.00 for rents due from said Hurd on August 15, 1881; and the record shows, that there was that much more due from Hurd to Ulman for three months' rent of this furnace property. This rent was due under a lease dated February 1, 1878.

The oldest mortgage held by said Browning on Lancaster Furnace property and fixtures was the one to Jacob Krauss, dated December 23, 1874, afterwards assigned to said Hurd, and then assigned to said Browning. This mortgage was on the fixtures sold by the constable, and, if it had been a lien created after the commencement of Ulman's lease, then by section 12, c. 93, Code W. Va. 1887, Ulman would be entitled to claim as against such lienor as much as one year's rent; but, as the lien existed when the tenantry of said Hurd to Ulman commenced, this statute has no operation in this case, and the mortgage in favor of Krauss now belonging to said Browning has the first claim to the proceeds of the sale made by Blue, constable; and the court below did not err in directing the proceeds to be paid to said Browning.

George Heller, another appellee, as a counter-assignment of error complains, that the court below erred in this portion of its decree of November 16, 1887: "And it appears to the court, that the defendant George Heller, on the 20th day of June, 1881, received from George E. Hooper, deputy-sheriff, upon an execution issued by the said Heller, and levied upon certain railroad iron, and a certain locomotive engine, tender, carts, wagon, and saw-mill engine, which was sold by said sheriff under said execution as the property of the Lancaster Furnace & Mining Company, the net sum of \$1,707.14; and it appearing to the court that none of said property was the property of said company, or liable to said execution, but that the same was included in the same mortgage executed by Charles S. Hurd to Edward S. Browning, and that the said claim herein before decreed to said Browning constituted a lien upon all of said property first in order of priority,—it is therefore adjudged, ordered, and decreed that said George Heller do pay to said Edward S. Browning said sum of \$1,707.14, with interest thereon from said June 20, 1881, to this day, now amounting to \$2,363.25, with interest of this sum \$2,363.25 from this day, in extinguishment to that extent of said Browning's claim against said Hurd; but this decree is made without prejudice as to any other remedy of said Browning, at law or in equity, to collect said \$2,363.25 in any other way, or from any other person, if any such remedy he has."

The following are the views of the counsel for said Hurd on this point :

“*First.* Said railroad is real estate, and therefore not subject to Browning’s claim. *Wright v. Ore Co.*, 45 Pa. St. 475. Appellee has the oldest judgment against said mining company, and his judgment is a lien upon said strip of ground belonging to said company, bought by it from Samuel Armstrong, and upon which about one third of said railroad track lies. The Armstrong land was not included in any of the mortgages made by the company. *Second.* If said railroad shall be held to be personal estate, then Heller’s execution was a lien upon it. This lien was sold under said execution, and the Circuit Court decreed, that Browning was entitled to proceeds. It will be observed that on the 22d day of December, 1874, the company executed a mortgage on all its personal property to secure a debt to Jacob Kraus; that Kraus assigned his claim to Hurd, and Hurd assigned his to Browning. There was never a foreclosure of this mortgage. Heller obtained a judgment against the company, and took out execution. This execution was levied on the railroad, among other things, and the iron was sold as the property of the company. The execution, it is true, was issued long after the mortgage was made and assigned. But it is maintained that the mortgage was never properly admitted to record, and therefore was void as to Heller, who is a *bona fide* creditor of the company. It is suggested that the mortgage was not properly acknowledged, and could not be legally admitted to record. The mortgage is signed by L. Sinsheimer, and acknowledged by Frank P. Clark. It is submitted that it could only be legally acknowledged by the person who executed it.”

The said railroad track is properly speaking to be regarded as real estate, and, so far as this record shows, George Heller has the oldest unsatisfied judgment against the Lancaster Furnace & Mining Company. A portion of the land, on which the railroad was built, was not included in any of the mortgages on this furnace-tract of land, and the proceeds of as much of this iron, as was on this Armstrong land, ought not to have been ordered by the Court to be paid to Edward S. Browning, but this much of the fund, which had

been paid by the deputy-sheriff, Hooper, to said Heller on his execution against the Lancaster Furnace & Mining Company, ought to have been allowed to remain there as property on his land and belonging to him; but, as we have said before, as the residue of this railroad track was included in the mortgages of Edward S. Browning, the proceeds of this portion of the track in the hands of said Heller ought to be decreed to be paid by him to said Browning. The record does not at present enable us to determine what portion of said railroad track was on Armstrong's land,—whether it was one third, as was claimed, or more or less than that portion. This must be ascertained, before it can be decided, what disposition should be made of the proceeds of the sale of this railroad iron.

It is claimed however, that one of these mortgages on this Lancaster furnace property and fixtures now owned by Edward S. Browning (the one of December 22, 1874,) is not a valid lien, because not properly recorded. The defect in its recordation is, that, while it was signed by Sinsheimer, president of the Lancaster Furnace & Mining Company, the mortgageor, and the corporation seal affixed by him, yet it was acknowledged by Frank P. Clark. It is claimed, that the corporation seal being attached to the deed of mortgage by the president, he was the proper and only person who could acknowledge this mortgage for recordation; whereas in this state no statutory provision exists as to the execution or acknowledgment of a deed by a corporation. The officer, who affixes the corporation-seal, is the party executing the deed, within the meaning of the statute requiring its acknowledgment by the grantor. See *Keily v. Calhoun*, 95 U. S. 710. But though not acknowledged by the president, who signed the deed, it seems to me, that it was properly acknowledged, because on its face was this provision: "And this deed further witnesseth, that the said Lancaster Furnace & Mining Company doth hereby appoint Frank P. Clark its attorney in fact to acknowledge these presents to be the act and deed of said company, to the end that the same may be properly recorded." Frank P. Clark, the certificate of a commissioner for West Virginia in Maryland acknowledged the said writing to be the act and deed of said

company. This, it seems to me, was an acknowledgment by the grantor, who, if a corporation, must act by some agent appointed to acknowledge the deed for recordation, had the corporation not expressly appointed some one else to acknowledge the deed for recordation. See *Talbert v. Stewart*, 39 Cal. 602; *Biglow v. Livingston*, 28 Minn. 57; 9 N. W. Rep. 31.

Martin L. Shaffer, another one of the appellees, makes a counter-assignment of error: "Appellee had no interest in the case of *Childs v. Hurd* and others, when the same was brought, and was only made a party because he then had the possession and custody of the property leased by Colgate to Hurd; and but for this suit the appellee Shaffer would have returned the property to Hurd or his assignee as soon as the object, for which he took it, had been accomplished, but was advised that he was by the said bill made the receiver, or was treated as such for the time being, and as such should let the property remain *in statu quo*, working as he had done. The leased premises remained in his custody until the expiration of said lease. *First*. It was error to charge appellee Shaffer with interest on the amount in his hands from the 1st day of May, 1883, because the amount was not a debt due from him, nor was it damages for a wrong committed by him. It was the proceeds of the leased premises which had accrued in his hands during the progress of the suit, which was at all times subject to the order of the court in the cause."

This counter-assignment of error cannot be sustained. It might perhaps in some other state, but in Virginia and West Virginia the law seems to be settled, that in such a case interest should be paid, because the money is worth the interest, and the creditor is entitled to the interest, and it is presumed, that the money was used by the party holding it. If he was unwilling to pay interest on it, he could at any time have avoided and stopped the payment of interest by paying the fund into court, when it would have been ordered to be loaned, if the court could not determine to whom it was properly payable. See *Tazewell's Ex'r v. Barrett*, 4 Hen. & M. 263; *Templeman v. Fauntleroy*, 3 Rand. (Va.) 446.

The appellee Mary E. Clerc also files a counter-assignment

of error. It is as follows: "The appellee Mary E. Clerc, wife of F. Leon Clerc, by way of counter-assignment of error in the decree made in this cause on the 16th day of November, 1887, says she is prejudiced by said decree, and that she is informed that the same is erroneous, for the following reasons, to-wit: In decreeing that portion of the iron tram railway lying on the Rosset land to be subject to the mortgage executed by the Lancaster Furnace & Mining Company in favor of Edward Browning. On the 3d day of July, 1874, John D. Rosset leased a large tract of land to said company for the purpose of mining and removing iron ore. Said lease provided, among other things, that said company 'shall have the right and privilege of removing from said lands all railroad machinery and fixtures placed thereon by it, provided all the rent and royalty due under the contract be paid. But it shall at no time remove anything so placed thereon when there remains due any royalty.' This property, as will be seen by the record, afterwards became the property of F. Leon Clerc. The said company put down the railroad track, and used it a year or so, and then failed; being at the time of the failure largely indebted to Rosset. There would seem no reasons why the conditions of this should not be observed. The railroad iron is not worth anything like the sum the company owed Rosset when it abandoned the lease."

The facts stated by the council of the appellee above are true, as appears from an examination of the record. The proof is that the Lancaster Furnace & Mining Company, when they failed, owed for royalty on this Rosset land more than \$1,000.00. The Rossets and those claiming under them took possession of this land when said company broke up and abandoned it. On November 19, 1887, F. Leon Clerc, who then owned this Rosset land, leased it to said C. S. Hurd for the purpose of working the iron ore on said land for a certain royalty. If, as the lease of 1874 provides, the lessee, the Lancaster Furnace & Mining Company, had no right to remove the iron ore, till all royalty due on the land was first paid, it would seem clear, that they could not confer such right on others either by sale or mortgage; and the right of every assignee, or person claiming under the Lancaster Furnace & Mining Company to the iron on the railroad must yield to

the claim for the satisfaction out of it first of the unpaid royalty on the leased land.

The counter-assignment of error in this respect, by the executrix of F. Leon Clerc, must be sustained as well founded.

For the reasons above given, the decree must be reversed with costs to the appellants against the appellees other than Childs & Brown, Edward F. Browning, John Hull Browning and Mary E. Clerc, executrix of F. Leon Clerc, and the cause is remanded for further proceedings to be had according to the principles stated in the opinion.

REVERSED. REMANDED.

CHARLESTON.

COFFMAN v. HEDRICK.

(SNYDER, PRESIDENT, absent.)

Submitted January 14, 1889. Decided February 11, 1889.

1. WILLS—DEVISAVIT VEL NON—CHANCERY—PRACTICE—UNDUE INFLUENCE—WITNESS—EQUITY—APPEAL.

The direction and trial of the issue of *devisavit vel non* is a proceeding under our statute to impeach or establish a will after a sentence or order made by the County Court or by its clerk and confirmed by the County Court; but it is not an appellate proceeding, and the Circuit Court in such a proceeding does not pass upon the regularity or irregularity of the proceedings to probate said will before the clerk or County Court. (p. 122.)

2. WILLS.

Upon a bill in chancery to contest the validity of a will, which has been admitted to probate, the functions of the suit are exhausted, when that question is decided. (p. 123.)

3. WILLS—WITNESS.

One of the attesting witnesses to a will, who is a brother to the party, who is claimed to have made the will in controversy, and who is introduced by the contestees to prove the execution of the paper in the absence of the other subscribing witness, who cannot be found after diligent inquiry, although said witness so introduced is a party to the suit brought to impeach the validity of said will, and would inherit a portion of the property devised

32	119
39	101
39	373
32	119
53	232
32	119
66	313

in the absence of said will, yet, if he is unprovided for in said will, he is not incompetent under the Code of West Virginia c. 130, s. 23 to testify in support of said will as to its proper execution. (p. 123.)

4. WILLS—UNDUE INFLUENCE.

Where a party is shown to have mental capacity sufficient to make a will, in the absence of fraud or undue influence the validity of the will can not be impeached, however unreasonable or unaccountable it may seem to others. (p. 132.)

5. WILLS—DEVISAVIT VEL NON—UNDUE INFLUENCE.

Upon the trial of an issue of *devisavit vel non* undue influence, in order to overthrow the will, must not only be alleged, but it must be proven by the contestants; it will not be inferred. (p. 132.)

6. INSTRUCTIONS.

Instructions, which are not based upon or applicable to the facts proven in the case, should not be given to the jury, although they may be correct as abstract principles of law. (p. 132.)

J. W. Harris and *J. W. Davis* for appellants.

R. F. Dennis and *J. A. Preston* for appellees.

ENGLISH, JUDGE :

This was a bill filed by Mason D. Coffman and David Coffman, Sr., and Rebecca, his wife, in the Circuit Court of Greenbrier county against David Hedrick and others, heirs at law of John Hedrick, deceased, contesting the validity of a paper purporting to be the last will and testament of John Hedrick, deceased, which appears to have been probated by the clerk of the County Court of said county on the 14th day of July, 1885, and on the 15th day of August, 1885, the County Court of said county made an order confirming the action of said clerk in admitting said paper-writing to probate as the last will and testament of said John Hedrick.

The Code of 1887 c. 77, s. 26, provides as follows: "The clerk of any County Court, during the recess of the regular session of said court, may admit wills to record upon the same proof, and with like effect, as the said County Court could do in session, but no contest as to such probate or record shall be heard or determined by the clerk. * * * * The probate of every will so made by such clerk shall be reported by him to the next regular session of the County Court, when, if no objection be made thereto, and none

appear to the court, the court shall confirm the same; but, if objection be made by any person interested, the court shall hear and determine the same," *etc.*

Section 29 of the same chapter provides, that any person feeling himself aggrieved by an order or sentence of the County Court confirming or refusing to confirm the action of the clerk of the County Court as to the probate of any will or admitting or refusing to admit any will to probate may within one year or, if such person be under disability, within one year, after such disability is removed, file his petition to the Circuit Court and appeal to said court from such order or sentence in the manner in said section prescribed; and said section also provides, that "the clerk of the Circuit Court shall upon the filing of such petition issue the proper process thereon, and the case shall be proceeded in, tried and determined in said court regardless of the proceedings before the County Court or clerk thereof and in the same manner in all respects, as if the application for such probate had been originally made to the Circuit Court."

Section 31 of said chapter provides: "Every such order or sentence of the County Court not appealed from and every such order or sentence of the Circuit Court on such appeal shall be a bar to a bill in equity to impeach or establish such will unless on such grounds, as would give to a court of equity jurisdiction over other judgments at law." This proceeding, however, was under the thirty second section of said chapter, which provides that, "after a sentence or order made as aforesaid, a person interested, who was not a party to the proceeding, may within five years proceed by bill in equity to impeach or establish the will, on which bill, if required by either party, a trial by jury shall be ordered," *etc.*, to determine the issue of *devisavit vel non*.

The appellants devote a considerable portion of their brief to the discussion of the question, whether the clerk of the County Court has power to admit a will to probate in an *ex parte* proceeding, and referring to section 31 of said chapter, which provides, that every such order or sentence of a County Court not appealed from shall be a bar to further proceedings, appellants' counsel asks: "How could one appeal, unless he had been made a party before the County

Court?" This question is answered by reference to section 28 of said chapter, which shows, that the parties interested must be convened, when the original application is made directly to the County Court. Section 26 provides, that a petition must be filed before said court by any person desiring the probate of a will. When a will is presented before a clerk for proof no petition or process is required by the statute, and the action of the clerk will be confirmed by the County Court without process or convention of the parties, if no objection be made thereto, and none appear to the court. Section 29 provides for an appeal from such order or sentence by any person feeling himself aggrieved by any order or sentence of the County Court confirming or refusing to confirm the action of the clerk of the County Court as to the probate of any will, and directs how such appeal must be taken: that the clerk shall issue process, and that the case shall be proceeded in, tried and determined in said court regardless of the proceedings before the County Court or clerk thereof and in the same manner in all respects, as if the application for such probate had been originally made in the Circuit Court.

If, then, the appellants in this case were aggrieved by errors committed by the clerk of the County Court, or by the County Court itself, in proceedings taken by either in the probate of the will in controversy, they had a plain, complete and adequate remedy by appeal to the Circuit Court in the manner prescribed by statute; and, while the statute seems clear, that when a will is presented to the clerk of the County Court during the recess of the regular sessions of said court for probate, the proceeding is *ex parte*; and when a will is sought to be proved before the County Court it must be done upon petition, and the persons interested must be convened, and when an order or sentence is made upon such proceedings before the County Court it is final, unless appealed from as provided in the twenty ninth section aforesaid,—yet in the proceedings now presented to this court on appeal I am of opinion, that the question as to the regularity or irregularity of the proceedings before the said clerk or County Court is not material.

It will be perceived, that section 32, which provides for

directing the issuing of *devisavit vel non*, commences as follows: "After a sentence or order made as aforesaid, a person interested, who was not a party to the proceeding, may within five years proceed by bill in equity to impeach or establish the will," etc., and, if no bill be filed within that time, the sentence shall be forever binding. And whether the order or sentence of the clerk of the County Court and the order of the County Court confirming the same were right or wrong, regular or irregular, it appears, that an order was made by the clerk admitting said will to record, and the County Court confirmed his action. These proceedings might have been appealed from by any person feeling himself aggrieved within one year; but it was not done, and the case is now presented to this court upon an appeal not from the action of said clerk or County Court but from the rulings of the Circuit Court upon the trial of the issue out of chancery directed in this cause; and the words of the order directing the issue plainly indicate, that the trial is independent of any former action.

The first error assigned by the appellants and contended for by them is, that David Hedrick, the brother of John Hedrick, who subscribed the paper purporting to be the will of said John Hedrick as one of the witnesses thereto, and who qualified as his administrator with the will annexed, was not a competent witness to prove the execution of said will under Code 1887, c. 130, s. 23, because he is the administrator with the will annexed, and the bill prays that he may be required to settle his administration accounts before the commissioner of the court, (although he is not made party to the suit as administrator;) and, if he was, his administration accounts could not be settled in this suit; neither could the lands of said John Hedrick be sold, and the proceeds be divided among his heirs according to their respective rights, as prayed; nor could the creditors of said John Hedrick be convened, as prayed for; and, after the payment of their debts, the surplus proceeds of the personal property could not be distributed among the heirs at law of John Hedrick, deceased.

In the case of *Dower v. Church*, 21 W. Va. 23, this Court held: "Upon a bill in chancery to contest the validity of a will

which has been regularly admitted to probate the functions of the suit are exhausted when that question is decided; and if the will is declared invalid and null, it is not competent for the court to proceed in that cause further." No action then could be asked or enforced against said David Hedrick in this case. His evidence seems to have been in favor of the establishment of the will, while his interest would seem to lie in the other direction; for if the will is sustained, he receives nothing, and if it is set aside he becomes one of the distributees of his brother's estate.

It is however contended, that, because the will in controversy devises the property to the children and grandchildren of said David Hedrick, he in testifying in his own behalf, when his evidence tends to sustain the will. In the case of *Seabright v. Seabright*, 28 W. Va. 415, it was held, that the word "against," as testifying against executors, administrators, heirs at law *etc.*, does not mean on opposite sides of a suit, but as having opposite interests in the suit. Under the head of "Competency of Witnesses to Will" Code 1887, c. 77, s. 18 we find the following language: "If a will be attested by a person, to whom or to whose wife or husband any beneficial interest in any estate is thereby devised or bequeathed, if the will may not be otherwise proved, such person shall be deemed a competent witness." Surely, then, David Hedrick would be no more incompetent, when the property is devised to his children and grandchildren, than he would be, if such property were devised to himself; and by section 20 of the same chapter the fact of his being an executor would not disqualify him; and an administrator with the will annexed would occupy almost precisely the same attitude.

Again, could the execution of the will of said John Hedrick have been otherwise proven than by admitting the evidence of said David Hedrick? It would seem not. He was one of the subscribing witnesses, and the other subscribing witness was absent in some one of the Western States, and his whereabouts could not be ascertained after diligent inquiry, and it does not appear, that any other persons were present at the time said paper was executed besides John Hedrick and the two subscribing witnesses; and under these circumstances the evidence of said David Hedrick was ab-

solutely necessary to prove the execution of said paper writing, and his testimony was admissible under the statute.

Was said David Hedrick a competent witness to prove the execution of said writing under section 23 of chapter 130 of the Code of West Virginia? In the case of *Kerr v. Lunsford*, 31 W. Va. 659 pt. 4 of Syll. (8. S. E. Rep. 493), it was held: "One who would inherit part of the testator's property but for the will is under section 23 of chapter 130 of the Code of West Virginia, incompetent to speak of the testator's capacity to make the will." In that case it seems, however, that Thomas Lunsford, one of the children and heirs at law of the testator, was asked his opinion of the mental condition of the testator; and it was held, that the court below properly refused to permit the question to be answered, holding that under the statute he was incompetent to speak on the subject, referring to *Anderson v. Cranmer*, 11 W. Va. 562. In that case however the witnesses were sworn in their own behalf, and it was held, that such witnesses were incompetent to give any opinions as to the grantor's sanity based on any transactions or conversations had with him personally at that or any other time. In the case of *Kerr v. Lunsford* Thomas Lunsford, the witness who was questioned in regard to the mental capacity of his father, whose will was being contested, was left nothing by the will, but the entire estate was devised to the mother of witness and his sisters or their children; and he was called as a witness by those contesting the will to testify as to the mental capacity of his deceased father, and was objected to by the proponents of the will, and the objection was very properly sustained. In that case he would not have been called by the contestants, if his opinion had been favorable to the devisees under the will upon the question of the mental capacity of his father; and if he had been allowed to testify, he would have been testifying in his own behalf and against the devisees under the will.

In the case under consideration however the witness, David Hedrick, was called by the proponents of the will, and the evidence given by him, which the Circuit Court was asked to exclude from the jury, was in support of the will and directly opposed to his own interests.

In the case of *McMechen v. McMechen*, 17 W. Va. 692, this Court holds, that under the statute a witness is not prevented from giving evidence against his own interest, because there can be no inducement to a witness to swear falsely, to prevent which and its consequences to other parties is the object of the statute. Again, when the statute speaks of transactions or communication had personally with a deceased person, can it be that such a transaction as the attestation of a will was contemplated, or must it not be such a transaction or communication, as the witness would derive some advantage or benefit from, some transaction or communication, in reference to which the testimony of the witness would confer on him an advantage pecuniary or otherwise over the estate of the deceased, which could not be obtained if said decedent was in life, and had an opportunity to be heard in contradiction of the testimony?

David Hedrick's testimony is as follows: "I signed that will at my brother John's request, and George Raynes signed at the same time at the request of my brother, and we were all three present at the time each signed." * * * * "That said testator, just before he signed the will, read it over, and said that it was just as he wanted it." I do not think, this testimony disclosed any such transaction or communication, as was contemplated by the statute to disqualify the witness. So far from the evidence conferring any advantage in his favor against the estate of John Hedrick, but for this will witness would have inherited one fourth of the estate, and under the directions of the will he gets nothing. And the other evidence in the cause shows, that the provisions of the will are in accordance with the previous declared intentions of the testator, which would indicate, that he would have no disposition to contradict the testimony of said David Hedrick, if he was in life, and had an opportunity to do so.

In the case of *McMechen v. McMechen*, 17 W. Va. 692, the court uses the following language: "Mrs. McMechen declining to renounce the will, moving for the appointment of an administrator with the will annexed, and the will itself providing so liberally for her, as the evidence shows, convinces my mind, that it was her individual interest to have the will sustained; her evidence therefore was not in her own behalf

but against her interest. It is no answer to say, that her evidence was in favor of her children. That is not prohibited by the statute but expressly allowed, notwithstanding the witness may be interested in the suit."

In this case David Hedrick in testifying in opposition to his own interest seems to have been testifying in behalf of his children, which he had a perfect right to do.

The competency of Ann Hedrick, the wife of David Hedrick, is also brought in question by the third assignment of error. It appears from her evidence, that she was the second wife of said David Hedrick and had no children. She it was who drew the will for said John Hedrick on the 27th or 28th of April, 1885, at his request, and in his presence; and after she had written it, he said it was just what he wanted; that said will so written by her was the one taken by her husband to Mr. Spotts to be copied, and, when so copied, was afterwards signed by said John Hedrick. She states that she and her husband went to said John Hedrick's on the 5th of June, and that she remained there until the evening of the 6th; that she was there at the time the will was made, but was not in the room or present, when it was signed; that said John Hedrick's mind was as clear on the 6th day of June as it ever was, and that he was as capable of making a will on that day as he ever was. The reason assigned for excluding her testimony is that she is the wife of David Hedrick, and that, if he is incompetent, she must be also. This witness is not interested in the establishment of the will because neither she nor her husband are devised anything by the will. She is a step-mother to some of the devisees, and, so far as her testimony might be swayed by her interest, it would be natural to expect her inclinations would be against the establishment of the will. I can see no legal objection to the evidence detailed by either David Hedrick or his wife.

The will of said John Hedrick is attacked by the plaintiffs, because it was not written by him or signed and acknowledged by him in the manner prescribed by law, or in such manner as to make the paper-writing his will; and on the ground of alleged mental incapacity at the time said paper was signed by him; and on the further ground that,

if he ever gave any sort of assent to the provisions of said paper, it was through the procurement and by undue influence of the defendant, David Hedrick and his wife.

As to the first ground of objection to the will the Code c. 77, s. 3 provides: "No will shall be valid, unless it be in writing and signed by the testator or some other person in his presence and by his direction, in such manner as to make it manifest, that the name is intended as a signature."

In the case of *Webb v. Dye*, 18 W. Va. 376, the court holds that a will must be subscribed by two attesting witnesses, but need not be proven by both of them; and although the witness Raynes was absent and did not appear to testify before the jury in this case, yet David Hedrick swears positively, that he signed that will at his brother John's request and in his presence and in the presence of said Raynes; that they were all three present at the time each signed; that when said Raynes went to sign the will as a witness, he said he thought he ought to know what was in the paper before he signed it, and John Hedrick said, "that is none of your business."

In the case of *Webb v. Dye*, *supra*, Judge JOHNSON in his opinion collates the authorities, citing several from Virginia and from other states bearing upon the question of the proper execution of a will, and among others the case of *Cheatham v. Hatcher*, 30 Gratt. 56, holding that a will must be subscribed, but need not be proven by two attesting witnesses. Also, *Jessee v. Parker's Adm'rs*, 6 Gratt. 57. In that case, it seems, one Dr. Tully wrote the will signed the name of the testator to it and also signed the names of himself, Jane Sanderson and Sallie C. Southall, as attesting witnesses to the will. Upon an issue of *devisavit vel non* the jury found in favor of the will. There was a motion to set aside the verdict and grant a new trial, which was overruled in the court below. ALLEN, J., speaking for the whole court, said: "The court is of opinion, that, as the jury were the proper judges of the weight and credit due to the testimony of the witnesses, the verdict in favor of the will sanctioned by the opinion of the court, before which a trial of the issue was had, has concluded all mere questions of fact depending upon the credit to be given to the witnesses.

The court is therefore of opinion, that upon this record it must be taken, that all the requirements of the statute in order to establish a will were satisfactorially proved." In the case of *Dudleys v. Dudleys*, 3 Leigh. 436, it appeared, that upon a question of probate the testimony of one of the attesting witnesses was contradicted by another. The County and Circuit Courts both gave credit to the witness for the will. On appeal from the sentence of probate it was held, that the Court of Appeals on a mere question of credibility of witnesses will always presume, that the inferior courts, which saw and heard the witnesses examined, decided correctly.

Upon the question as to the mental capacity of said John Hedrick on the 6th day of June, 1885, to make a valid will, we have the testimony of Mrs. Ann Hedrick, who says, she drew the will at the request of said John Hedrick and in his presence, who said it was just what he wanted; that the will written by her was the one her husband took to Mr. Spotts, to be copied, and, after being so copied by Spotts, is the one in contest; that she was not in the room, when the will was signed, but that said John Hedrick's mind was as clear on the 6th of June, as it ever was, and he was as capable of making a will on that day, as he ever was. This witness was not a party to this suit; neither would she inherit anything, if the will should be held to be invalid.

Dr. J. B. Spicer, a witness for the contestees, stated, that he knew said John Hedrick since 1873; saw him on June 2, 1885; called to see him professionally; that said Hedrick knew him as soon as he saw him; that he found said Hedrick suffering from diseased liver, want of appetite, a bronchial affection and weakness; that his mind was as clear, as he ever saw it; that he conversed rationally and was in the opinion of witness as competent to make a will, as he ever was in his life; that he saw him again on the 19th of June, 1885, and found him more feeble in body but entirely in his right mind and competent to make a will; saw him again on the 23d of June, when he was still more weak in body, but had mind enough to make a will, *etc.*

Austen Handley was sworn for the contestees and stated, that he had known John Hedrick all his life; was at his

house in the middle of May, 1885, and talked with him a half hour; that he was entirely rational, understood what he was talking about and from conversation, conduct, manner and appearance witness thought him competent to make a will; thought his mind as clear, as he had ever seen it.

David Tuckwiler, a witness for contestees, testified, that he had known John Hedrick all his life; saw him in the month of April, 1885; made a contract with him to graze some cattle; saw him again about the 20th of June; talked with him some little time; that said Hedrick talked rationally; said, if he (witness) would leave his cattle there until full, they would get fat; witness had already spoken of taking them away; asked him how much he owed him for grazing said cattle, and he replied, \$12.00, which was the correct amount due him for the grazing; that he was capable of mental exertion, and in the opinion of witness was competent at that time to make a will.

Contestees had Rev. A. M. Chappel sworn, who testified, that about the 20th of June, 1885, he conversed with John Hedrick about spiritual matters; that said Hedrick conversed rationally, knew what he was talking about; saw him again about a week before he died; that said Hedrick was sane at both times he saw him.

W. Anderson also testified, that he saw John Hedrick in May, and made a contract with him to keep some cattle for him; that he went back on the 14th of June to settle with him for the pasturage of the cattle; talked with him for some little time; he talked rationally, understood what he was doing and talking about; that he settled with him for the pasturage and paid him the money due him; that he considered him on both occasions capable of making a will.

John Leedy also testified, that he was at John Hedrick's house on the 8th of June; was with him two hours; saw nothing wrong with his mind and from his conversation and manner thought him competent to make a will.

William Flack testified, that he saw John Hedrick on the 3d or 4th of June, 1885; was with him some time; they walked up to the barn; the said Hedrick told him, that David Coffman, the plaintiff, should never have any of his property; that, before he should have a cent of his property, he

would give it to charitable purposes; that he saw nothing wrong with his mind, that he talked rationally, and from all witness saw of him he thought him capable of making a will,—as much so as ever he was.

A considerable amount of testimony was introduced before the jury by the contestants, some of which was conflicting with the foregoing testimony. But in the case of *Dower v. Church*, 21 W. Va. 63, this Court holds, that “in trying this particular issue of *devisavit vel non* the rule, which governs a common-law court, prevails in granting new trials, and that rule is, that in reviewing the action of the court below, when the evidence is all parol evidence, and it is conflicting, the appellate court will reject all the evidence of the exceptor which is in conflict with the other party; and upon the evidence of the appellee giving it full force and effect, and that of the appellant not in conflict with it, if the case is in favor of the appellee, the verdict of the jury, and the decree based upon it, will be approved and affirmed;” referring to *Lamberts v. Cooper’s Ex’r*, 29 Gratt. 61; *Webb v. Dye*, 18 W. Va. 376; *Nicholas v. Kershner*, 20 W. Va. 251, and many others.

The contestants in their bill allege, “that, if ever said John Hedrick gave any sort of assent to the provisions of said pretended will, it was through the procurement and by the undue influence of the defendant David Hedrick and his wife.” In regard to undue influence we find it stated in 1 Jarm. Wills, 133, that the influence to vitiate an act must be such as to amount to force and coercion, destroying free agency, and there must be proof, that the act was obtained by this coercion; referring to *Gardiner v. Gardiner*, 34 N. Y. 155, and *Gaither v. Gaither*, 20 Ga. 709. Also: “In order to set aside the will of a person of sound mind, it must be shown, that the circumstances of its execution are inconsistent with any hypothesis but undue influence, which can not be presumed but must be shown and in connection with the will and not with other things;” referring to *Brick v. Brick*, 66 N. Y. 144; *Eckert v. Flowry*, 43 Pa. St. 46, and numerous other authorities. It is also held in the case of *McMechen v. McMechen*, 17 W. Va. 701, that “the burden of proof of fraud or undue influence exercised to induce a testator to execute

a will is on him who alleges it; it is not on the propounder of the will."

In the case under consideration however the contestants of the will have introduced no testimony which tends to prove, that undue influence was exercised by David Hedrick or any other person towards or over said John Hedrick, to control the disposition of the property mentioned in his will; and, this being the case, as a matter of course fraud or undue influence can not be considered in determining the issue of *decisavit vel non*, as fraud or undue influence will not be inferred. The law recognizes the sovereign right of every man to dispose of his property, as to him may seem best, and when it has been disposed of by a man of sufficient mental capacity to make a will and without any undue influence or fraud practiced upon him, no matter how unreasonable or unjust the disposition may seem to others, a sufficient answer to all objections is found in the fact, that such is his will and the disposition therein made conforms to his wishes.

Upon examination of the instructions given to the jury on motion of the contestees, comparing them carefully with the law and considering them in connection with the evidence introduced upon the trial, they seem to me to propound correctly the law applicable to the testimony, and the Circuit Court did not err in giving them to the jury.

It is, however, assigned as error in this cause, that the court below corrected the second instruction asked for by the contestants by striking out the words "jealous eye," and inserting "careful scrutiny;" but the words taken in connection with the language used in the instruction are so nearly synonymous, that either expression might have been used without creating a different impression on the minds of the jury. I do not therefore regard the correction as material. See *Cheatham v. Hatcher*, 30 Gratt. 56; sixth point of syllabus.

The appellants also assign as error the refusal of the court below to give the instructions asked for by them, numbered from 3 to 19, inclusive. On examining these instructions, however, it will be found that instructions Nos. 3, 4, 5, 7, 8, 10, 11, 12, 14, 15, 16, refer directly to the question of undue

influence ; several of said instructions stating how and when undue influence upon the mind and actions of a testator may be inferred ; and, as we have seen above, the burden of proof of fraud or undue influence exercised to induce a testator to execute a will is on him, who alleges it ; and it can not be presumed but must be shown. And, as there appears to be no evidence of undue influence in this case, I must regard said instructions as irrelevant, and calculated to mislead the jury, and that they were properly refused. As to instructions numbered 6, 9, 13, 17, 18, and 19 I am of opinion, that the court below committed no error in rejecting the sixth instruction, because there must be clear evidence of a disposing mind at the time the will was made, whether the dispositions of the will are equal or unequal, as the court told the jury in instruction 1 ; and, as to instructions 9, 13, 17, 18, and 19, the court below acted properly in excluding them, because they are predicated upon a statement of facts, which is not borne out by the testimony in the cause, and are calculated to mislead the jury. I am inclined to think the fourth instruction given by the court, to wit, " that the propounders of the will must prove that John Hedrick executed the will as his own voluntary act free from the fraud, coercion or undue influence of those about him," does not propound correctly the law, as the burden of proof on those points rests upon the contestants ; but this error is not one, of which the appellants can complain.

Upon the case presented by the entire record I am of opinion, that the court below did not err in overruling the plaintiff's motion to set aside the verdict rendered by the jury upon the trial of the issue directed in this cause and grant them a new trial ; and the decree rendered upon said verdict must be affirmed, with costs to the appellees.

AFFIRMED.

CHARLESTON.

CENTRAL LAND CO. v. LAIDLEY.

Submitted January 16, 1889.—Decided February 11, 1889.

1. DEED—MARRIED WOMAN—SEPARATE ESTATE—CERTIFICATE OF ACKNOWLEDGMENT—EJECTMENT.

If a deed from husband and wife conveying land of the wife be void as to her because of defective certificate of her examination and acknowledgment, and after the death of her husband she convey the land to another with notice of the former deed, yet the second purchaser will not be affected by such notice, the former deed being void and passing no right legal or equitable, and the second purchaser does not hold the land as trustee for the first purchaser, and equity will not compel him to convey to the first purchaser nor will it enjoin the second purchaser from prosecuting an action of ejectment to recover the land from the first purchaser's possession or that of his vendee. (p. 139.)

2. DEED—REFUNDING PURCHASE-MONEY--WARRANTY--MARRIED WOMAN—SEPARATE ESTATE.

Nor will equity refund to the first purchaser or his vendee the consideration paid by the first purchaser by personal decree against second purchaser, or by charging it on the land. The covenant of warranty in the deed binds the woman no further than to pass her land even if valid. (p. 142.)

3. DEED—MARRIED WOMAN—SEPARATE ESTATE—CERTIFICATE OF ACKNOWLEDGEMENT—ESTOPPLE.

Though during coverture the wife bring suit against her husband and others to assert her right to land acquired by her husband in his name with the consideration paid by such first purchaser, reciting in her pleading, that she had executed such deed to such first purchaser and received the consideration, and obtained a decree giving her such land, and declaring it her separate estate, that will not estop her or such second purchaser, from recovering the land from the first purchaser or his vendee. (p. 140.)

4. DEED—MARRIED WOMAN—RATIFICATION.

Though in such suit she so recite her former deed, and though she and her husband make a deed to another person for one acre within the bounds of the tract mentioned in the void deed, which that deed had reserved to her, describing it as the one acre reserved in the void deed, referring to that deed as a deed, yet this is no ratification of such void deed. During coverture she cannot ratify such void deed by mere admissions or recitals or other acts *in pais*, but only by acknowledgement of the void deed, or the execution of another instrument with privy exam-

39	134
34	61
32	134
36	361
36	800
32	134
49	433
32	134
49	302
32	134
52	626
52	631
32	134
59	110
32	134
63	383

ination, acknowledgement, and recordation, as prescribed by the statute. (p. 140.)

5. DEED—MARRIED WOMAN—SEPARATE ESTATE—HUSBAND AND WIFE.

Where by deed land was conveyed directly to a married woman prior to the Code of 1863, such conveyance did not create in her a separate estate, but the husband become entitled to a freehold estate in the land, which would continue at least during the joint lives of the husband and wife, with remainder in fee to the wife. (p. 143.)

6. DEED—MARRIED WOMAN—HUSBAND AND WIFE—CERTIFICATE OF ACKNOWLEDGEMENT—RIGHT OF ENTRY—STATUTE OF LIMITATIONS.

In such case, if the husband and wife by a deed void as to her for want of a proper certificate of her examination and acknowledgement convey the land to a party and put him in possession, such purchaser is entitled to hold that possession until the death of the husband, and the wife or her heirs or any one claiming under them has no right of entry until the husband's death, and right of action does not accrue to them, nor does the statute of limitations run against them, until his death. (p. 143.)

J. H. Ferguson and Simms & Enslow for appellant.

Brown & Jackson and *J. B. Laidley in pro. per.* for appellee, Laidley.

BRANNON, JUDGE:

By deed dated 18th August, 1865, Rebecca J. Everett conveyed to Sarah H. G. Pennybacker then a married woman 240 acres of land now within the city of Huntington. By a deed dated 25th February, 1870, Sarah H. G. Pennybacker and her husband, John M., united in a deed purporting to convey said land to C. P. Huntington; and by deed dated 16th October, 1871, Huntington conveyed it to the Central Land Company. Huntington took possession, and after him the Central Land Company, and it laid off a large part of said land into lots, streets and alleys, sold many lots, and buildings have been erected thereon. Mrs. Pennybacker's husband died 5th May, 1881, and she by deed dated 26th January, 1882, conveyed said land to John B. Laidley, who had full notice of said deed to Huntington when he took his conveyance. In March, 1882, Laidley brought an action of ejectment against the Central Land Company and others to recover

this land, and on its trial there were a verdict and judgment for defendants. Upon a writ of error to said judgment it was reversed, and the action of ejectment was remanded for re-trial to the Circuit Court of Cabell county, where it is now pending.

On the decision by this court of the writ of error, as will be seen from the case of *Laidley v. Land Co.*, 30 W. Va. 505, (4 S. E. Rep. 705,) the said deed from Mrs. Pennybacker and her husband to Huntington was held void because of defect of the certificate of the privy examination and acknowledgment of Mrs. Pennybacker.

Pending said writ of error, the Central Land Company brought a chancery suit against Laidley and others, alleging the facts above stated; and further that Laidley procured his deed from Mrs. Pennybacker by misrepresenting to her, that she was conveying a dower only, and paid her only \$500.00 for it, whereas Huntington had paid \$11,000.00 and the land was worth at date of Laidley's deed \$30,000.00; and that it had sold divers lots to the Chesapeake & Ohio Railroad Company and others, who had built railroad tracks and houses thereon, and relying on adverse possession from the date of the deed to Huntington; and that Laidley when he took his deed had full knowledge of the deed from Pennybacker to Huntington, and from Huntington to the land company, and of the sales of said lots. Said Land Company further alleged, that in 1872 Mrs. Pennybacker brought a chancery suit against her husband and others, in which she stated, that she had on payment to her of \$11,000.00 consideration conveyed the land to Huntington, that it was her separate estate, and that her husband had agreed to invest the money in other land for her, but had wrongfully invested it in his own name in two farms, and which farms she sought to have declared her separate estate and conveyed to her; and that a decree had been rendered in said suit declaring her entitled to one of those farms,—the Noel farms—by reason of the investment therein of money arising from said sale of her land to Huntington; that she and her husband had made a deed to one Parsons, duly acknowledged, conveying one acre, which in the deed to Huntington she had reserved, and that in the deed to said Parsons she recognized the Hunting-

ton deed in describing the one acre by the language, "and more particularly described in a deed of the party of the first part to C. P. Huntington."

The bill contended, that by reason of said deeds and the plaintiff's claim and possession of said land and the claim of Mrs. Pennybacker through said chancery suit and decree therein, recognizing said sale to Huntington and obtaining the benefit of its proceeds, and her recognition of the conveyance to Huntington in her deed to Parsons, and the knowledge on the part of Laidley of all the rights of all these parties, when he took his deed, the said land company had good title, which was beclouded and disquieted by Laidley's claim and action of ejectment.

It appeared, that Mrs. Pennybacker had later suffered losses and was insolvent, and her husband's estate likewise, and not good for the warranty in said deed.

The bill claimed, that Laidley held under his conveyance from Mrs. Pennybacker as trustee for the Land Company and others owning parcels of the land under it; and it prayed that he be required to convey said lands to them, and be enjoined from prosecuting said action of ejectment and other actions, which Laidley had instituted against vendees of said company; or, if such relief could not be had, that Laidley be required to refund the \$11,000.00, which Huntington had paid Mrs. Pennybacker for the land, and that the land be charged with it.

Laidley filed an answer maintaining, that by the deed from Pennybacker and wife John M. Pennybacker passed only a life-estate to Huntington, as the deed from Everett to Mrs. Pennybacker invested him with a life-estate and her with a remainder in fee; and that Mrs. Pennybacker by the deed to Huntington did not convey her estate to him, and denying that she received the \$11,000.00 consideration from Huntington, and averring that her husband received and squandered it. He denies, that he represented to her, that she had only a dower, and avers told her her deed to Huntington was void, and she could recover a fee-simple. He denies all right of the plaintiff, and contends that he (Laidley) is not to be deemed a trustee holding the title for the com-

pany, and in all respects relies on his title, and resists at length the entire claim of the plaintiff.

The plaintiff filed an amended and supplemental bill setting up the sales of other parcels of land to other parties, and stating that since the filing of the original bill said writ of error had been determined, reversing said judgment in ejectment, and granting a new trial, and alleging again substantially the facts stated in the original bill, claiming that the plaintiff had superior equity, while Laidley held the legal title, and praying the same relief as was prayed for in the original bill.

Laidley answered contesting the plaintiff's case from first to last, alleging that the deed to Huntington had been held void by the Supreme Court, asserting his title and insisting that the plaintiff's title was void.

Mrs. Pennybacker filed demurrers to both bills, assigning various grounds. Laidley also filed demurrers to both bills, specifying various grounds. Voluminous depositions were taken by both sides. On the hearing the bills were dismissed; and plaintiff took the appeal, which we now decide.

This is a very important cause involving the right to a large part of the growing city of Huntington. The deed from Pennybacker and wife to Huntington has been held by this court void as to the fee because of defects in the certificate of the examination and acknowledgment of Mrs. Pennybacker. We must in deciding this cause start on our road with that fact settled, and follow the logical, legal sequences, lead where they may. A line of decisions by this court holds, that a married woman's deed with such defective certificate is not merely voidable but utterly void *ab initio*. No power can now change this rule but that of the legislature. This paper, though it has the form and semblance of a deed, is no deed in law as to Mrs. Pennybacker and as to her passed no title whatever,—not a shadow of title either legal or equitable—to Huntington; and in the language of the Maryland court in *Johns v. Reardon*, 11 Md. 465, is to be dealt with, as though Mrs. Pennybacker were no party to it. Therefore title remained in her notwithstanding said deed, and she could and did pass it to Laidley by her subsequent deed to him.

Plaintiff admits, that Laidley has the legal title, but contends, that it has the equitable title, and that Laidley taking his deed with knowledge of its rights is in equity but a trustee holding title for the plaintiff's benefit and should be compelled to convey to it. But the trouble, which faces this position is, that Huntington's deed being void conferred no title on him, and his vendee has no shadow of title, which the law can see: To affect a second purchaser with a first purchaser's right, that first purchaser must have a right known to the law valid and enforceable, not one void, unknown to the law and outside of its recognition. How can the law notice what does not exist—a mere nonentity? Some right may exist *in foro conscientiae* but the *forum legis* knows it not. The statute is intended to protect the woman, to enable her to retain her estate, unless she convey it in the mode by it prescribed; but what good would her estate do her, if she could not after such void deed sell it? Under this argument, she could not sell it, for whoso would buy it would be affected with a trust for the first vendee. This would defeat the statute. The statute would thus in one breath say to her: "You shall not convey, unless you convey in a certain mode," and in the next: "As you have conveyed, though not in the mode prescribed, you shall never hereafter sell to another." This would be a gross inconsistency.

In the case of a married woman's void conveyance, (*Mattox v. Hightshue*, 39 Ind. 95,) it was held, that "a right in equity can not grow out of an illegal and void transaction." *Mustard v. Wohlford*, 15 Gratt. 329, was a case, where an infant sold land by title-bond to Mustard and later, when of age, sold the same land by title-bond to Wohlford with notice of the sale to Mustard, and later conveyed it to Mustard pursuant to his sale to him; Mustard having notice of the sale to Wohlford. Wohlford sued Mustard and the vendor to cancel Mustard's deed and get title to himself and succeeded. The court held, that, if an infant convey land, he may convey to another when of age, and his deed will avoid the first conveyance; and that the disaffirmance of the first sale by the second sale, after the infant has become adult, rendered the first sale void and extinguishes any interest in law or equity, which the first purchaser may

have acquired under it, and entitles the vendor or second purchaser in his name to recover possession of the land at law and hold it free from any equity of the first purchaser.

That case logically by analogy rules this case. An infant's conveyance is not void but voidable, whereas a married woman's deed without proper certificate is void at the start. If a man may purchase the infant's land, after he becomes of age, with notice of a prior sale to another during infancy vesting the first purchaser with title until avoided, and the second purchaser takes a better title than the first and can call on equity to enforce his right by taking from the first purchaser his legal title acquired, after the infant obtained his majority, pursuant to his sale in infancy, why can not much more a second purchaser from a married woman acquire a better title than one, who took from her a deed not voidable but void at the instant of its execution? As Judge AGNEW said in *Glidden v. Strupler*, 52 Pa. St. 402, in speaking of a married woman's void deed: "Equity can not breathe life into a legal nonentity." 1 Story, Eq. Jur. § 177, says of married women's void acts: "Equity must follow the law, be the consideration ever so meritorious." Such void deed can not be void in a court of law and valid in a court of equity, for the statute binds both. "What immunity or protection would a woman have from her incapacity to alienate her property, if it could be removed by changing the form of action from law to equity?" asks Judge AGNEW in *Glidden v. Strupler*, cited above. And so the plaintiff's appeal to a court of equity from a court of law must be vain; for the iron rule of the statute in question binds both courts with its imperious power.

Another point is made by the able counsel of the plaintiff based on the idea of estoppel; the argument being, that, as she received the money under the sale to Huntington and used it, and some of it was paid for a farm in her husband's name, which she followed up by suit and secured and now enjoys, she cannot repudiate her conveyance to Huntington.

The statute was meant for her protection. Were she herself suing for her land, would any one question her right to recover? To forbid her would be a virtual repeal of the

statute by the court. Had she sealed and delivered the deed and received the money, and there were no appearance of a certificate of acknowledgment, could she not recover it? To forbid her would deny her the protection the common-law and statute afford her. What is the difference between the two cases? This estoppel is based solely on or arises solely from the void deed and is to bar a married woman. Herm. Estop. § 1099, says: "When an agreement is void for infancy or coverture, an estoppel founded solely on it must be equally void. The law throws its protection around infants and *femes covert*, and they can not be made liable to a contract by their own representations." The Supreme Court of Indiana in *Mattox v. Hightshue*, 39 Ind. 95, concerning a married woman's void deed says: "A party can never be estopped by an act, that is illegal and void." In *Glidden v. Strupler*, cited above, Judge AGNEW says: "The next point is that of estoppel. If through the administration of equity we can produce a result, which the law denies *ab initio* on grounds of public policy, then estoppel or compensation, its equitable equivalent, does what the law and policy have forbidden. But we have seen, that in such a case equity does not overturn but follows the law." If Mrs. Pennybacker would not herself be estopped, neither would Laidley. In purchasing he did no wrong in the eye of the law. He but purchased from her an estate, which it was lawful for her to convey, and stands in her shoes invested with all her rights. *Rogers v. Higgins*; 48 Ill. 211.

Again, it is said, that in the suit of Pennybacker against her husband and others, wherein she referred to the deed to Huntington and claimed the money as her separate estate and sought its proceeds, and by her reference in her deed to Parsons to the deed to Huntington she recognizes that deed and ratifies it. So it was contended in *Leftwich v. Neal*, 7 W. Va. 569, that letters of the married woman and other evidence tending to show, that she admitted the validity of the deed, should be considered. Judge PAULL said: "We think the testimony wholly inadmissible for the purpose." He cited *Elliott v. Peirsol*, 1 Pet. 328, quoting from that case the following language: "What the law requires to be done and appear of record can only be done and made to appear

by the record itself." He quoted from *Barnett v. Shackleford*, 6 J. J. Marsh, 532: "Parol evidence is not sufficient. It can only be proved by the record. If parol evidence should be admitted to establish it, then an acknowledgment by a *feme covert* before witnesses *in pais* would be as good as an acknowledgment before the officer designated by law and making up a record thereof in the manner prescribed, and thus the guarded provisions of our statutes might be substituted by a new branch of equity jurisdiction." In *Glidden v. Strupler*, *supra*, it is held: "The contract of a married woman being void, it cannot be ratified unless by deed in the mode described by the statute."

The claim of plaintiff to compel Laidley by a charge on the land to repay the \$11,000.00 purchase-money paid by Huntington can not be sustained. Laidley was not a party to the deed from the Pennybackers to Huntington, and the claim is purely a personal demand and only against the husband of Mrs. Pennybacker; and as Huntington's deed was void, and he thereby acquired no interest in or concerning the land, his payment does not attach to the land or follow it into Laidley's hands. *Mustard v. Wohlford*, 15 Gratt. 329. Even if the deed were valid, the covenant of warranty would not avail against Mrs. Pennybacker, as by Code 1887, c. 73, s. 6 such covenant binds the woman no further than to pass her land. It could not charge the land, for that would measurably defeat the object of the law, declaring her deed not conforming to the statute void, and yet incumbering it with the purchase-money. She could not by deed of trust charge it without privy examination, yet under this theory she can indirectly incumber it to its full value by charging it with the purchase-money received under a void sale. Out of an act utterly void equity is to give birth to a lien, which will sweep away her land and thus indirectly do just what the act meant should not be done.

In *Scott v. Battle*, 85 N. C. 185, it was held, that the married woman's conveyance was a nullity, and the vendee had no lien on the land for purchase-money and no right of action against the woman personally. The court after showing why the deed was void by reason of the acknowledgment not conforming to the act added: "It would seem, that the

same reasoning must be a full answer to the defendant's demand for the restoration of the purchase-money. * * * In no case will the law imply a promise on her part, and any one, who deals with her, is held to do so with a knowledge of her disability."

As to the claim of adversary possession under the statute of limitations, this Court held, that the deed from Pennybacker and wife to Huntington having been made prior to the enactment of the Code of 1868, containing section 8 of chapter 66, did not confer on Mrs. Pennybacker a separate estate, but conferred on her husband a freehold estate, which would continue during the joint lives of husband and wife, with remainder to her. Huntington by the deed to him became vested with the freehold life-estate of the husband of Mrs. Pennybacker, and he and his vendees had right to possession, as long as her husband lived, and she or Laidley had no right to that possession until his death; which occurred May 5, 1881. Thus her right of action did not accrue until then, and the ejectment was brought 28th March, 1882. The action is not barred. *Bolling v. Teel*, 76 Va. 487; *Wood*, Lim. 527, 528; 1 Rob. Pr. 508-510; *Tyler*, Ej. 923, 946; 3 Washb. Real Prop. 132, 133; *Ball v. Johnson*, 8 Gratt. 285; *Merrit v. Smith*, 6 Leigh, 493.

The case of *Shivers v. Simmons*, 54 Miss. 520, is greatly relied on by the appellant. The syllabus is: "A married woman, who on exchanging lands received a perfect deed but gave one, the certificate of acknowledgment, to which was fatally defective, is estopped, when nine years thereafter the defect is discovered, to assert her title, if she has sold the lands received and with the proceeds purchased others." This was a case of exchange, it may be noted. The judge delivering the opinion says: "We do not say, that a mere reception of the purchase-money would estop her, where she has attempted to convey by an invalid deed, though it seems difficult to see how the purchaser's title is void in the one case and not in the other. It is true, on the other hand, that a man, who has made a conveyance wholly inoperative under the statute of frauds, will not always be estopped by a reception of the purchase-money, and that the remedy of the vendee ordinarily is by an action for its recovery. But that

is not the case before us. Mrs. Shivers bargained for an exchange of lands with the appellee." So according to that court that case is not exactly in point here.

The case of *Warner v. Sickles*, Wright, 81, is also urged by the appellant, wherein there was a sale of land by a married woman, who afterwards conveyed it to a third person with notice of the first sale, and the second purchaser was held to hold for the first purchaser and was decreed to convey to him. The court thought the title-bond of the *feme* void, and that it could not be enforced against her or her heirs, yet said she had no interest to protect but had conveyed to a third person, and for that reason held that third person a trustee: How the instrument could be utterly void as to the *feme* and her heirs and not enforceable against them, and yet valid against one who purchased from her by proper deed and became vested with her estate, I cannot see. The conclusion seems illogical.

We do not think these cases propound the law correctly, and we can not follow them.

As to the charge that Laidley obtained his deed by misrepresentation and fraud and for inadequate price we express no opinion for the Central Land Company having no interest in the estate by reason of the void deed can not avail itself of such misrepresentation, fraud and inadequacy, if that allegation were ever so well sustained.

The decree of the Circuit Court of Summers county is affirmed with costs to appellee.

AFFIRMED.

CHARLESTON.

SHERRARD v. KEITER.

Submitted January 23, 1889. Decided February 11, 1889.

REVIVAL OF JUDGMENT—LIMITATION OF ACTIONS.

Under sections 11, 12, ch. 139, of the Code a judgment can be revived by *scire facias* against the personal representative of the debtor within ten years from the return-day of the last execution, though that time may be more than ten years from the date of

the judgment: provided such revival be made within five years from the qualification of such representative.

Statement of the case by BRANNON, JUDGE:

On the 4th day of April, 1881, the president, directors and company of the Farmers' Bank of Virginia, use of R. B. Sherrard, sued out of the Circuit Court of Hampshire county a writ of *scire facias* to revive a judgment recovered by them on the 8th of November, 1856, against George Keiter for \$1,200.00 and \$2.01 with interest on whole from 5th of July, 1855, and costs. The writ averred, that on the 12th of November, 1856, an execution issued on the judgment, which was returned "No property found," and that on the 7th of April, 1860, a second execution issued returnable in May, 1860, which was returned "No property found." The writ also averred the death of Keiter, and that on the 17th of September, 1880, administration of his estate was granted to the sheriff, defendant to said writ.

The defendant filed a plea of the statute of limitations, averring that more than ten years had elapsed from the date of the judgment to the issuing of the *scire facias*, to which plea the plaintiff entered a demurrer, which the court overruled. The plaintiff then filed the three following replications to the plea: (1) that plaintiff could not truly make the affidavit prescribed by sec. 27 ch. 106 of the Code; (2) that his right to sue out execution was obstructed by war, insurrection and rebellion from the 1st day of June, 1861, to the 17th day of November, 1865; (3) that his right to sue out execution was obstructed by war insurrection and rebellion from the 17th day of April 1861 to the 1st day of March, 1865. To these replications defendant demurred, and his demurrers were sustained. Facts were agreed, and the case submitted on them, viz., that judgment was rendered and execution issued and returned at the date and for the amount stated in the *sci. fa.*; and that the plaintiff could not truly make the affidavit prescribed by section 27, c. 106, of the Code; and that plaintiff's right to sue out execution was obstructed by war, insurrection, and rebellion from the 17th day of April, 1861, to March 1, 1865.

Robert B. Sherrard filed an affidavit, that he could not

truly take the oath prescribed by section 27, c. 106, of the Code.

On the 20th day of February, 1882, the Circuit Court entered an order finding, that at the time of the issuing of the *scire facias* more than ten years had elapsed from the date of the judgment, excluding the period from the 17th of April, 1861, to 6th of February, 1873, and expressing the opinion, that the judgment was barred, refused to revive or award execution on it and gave the defendant his costs. The plaintiff, Sherrard's administrator, obtained this writ of error.

S. L. Flournoy, for plaintiff in error.

No appearance for defendant in error.

BRANNON, JUDGE:

The Circuit Court evidently proceeded on the view, that under section 11, ch. 139, Code 1868, where there has been a change of parties by death, ten computable years after its date would bar the judgment, notwithstanding less than ten years had elapsed from the return-day of the last execution; but that construction of that section has been overruled by the case of *Laidley v. Kline's Adm'r*, 23 W. Va. 565, holding in point 5 of the syllabus, that under sections 11, 12, ch. 139, Code 1868, a judgment may be revived by *scire facias* against a personal representative of the judgment-debtor within ten years of the return-day of the last execution issued thereon, although that time may be more than ten years after the date of the judgment: provided such revival be made within five years from the date of the qualification of such representative. Therefore the plea averring that more than ten years had elapsed from the date of the judgment was not good, because the *scire facias* alleged, that two executions had issued—the last returnable in May, 1860—and the plea therefore did not answer the averment, and the demurrer to it should have been sustained.

The plea fixing the date of the judgment—8th of November, 1856—as the initial day of the running of the statute, the replications were no answer to it; for excluding all the time, which they sought to exclude from computation, still there would remain ten years running time under the statute from

date of the judgment, and in that view the replications were properly rejected; but if the plea had not based itself on the date of the judgment but on the return-day of the last execution, which it should have done, the replications would have been good.

The judgment upon the *scire facias* must be reversed with costs to the plaintiff in error, and the plaintiff's demurrer to the defendant's plea sustained, and said plea rejected; and the cause is remanded to said Circuit Court for further proceedings.

REVERSED. REMANDED.

CHARLESTON.

SHERRARD v. KEITER.

Submitted January 23, 1889.—Decided February 11, 1889.

S. L. Flourney, for plaintiff in error.

No appearance for defendant in error.

BRANNON, JUDGE:

On the 4th day of April, 1881, R. B. Sherrard sued out of the Circuit Court of Hampshire county a writ of *scire facias* to revive a judgment recovered by him in the County Court of Hampshire against George Keiter on the 8th of November, 1856, for \$1,750.00 with interest and costs. The writ averred, that on the 12th day of November, 1856, execution issued on said judgment, which was returned, "No property found;" and that on the 17th of April, 1860, another execution issued on said judgment, returnable to May, 1860, and returned, "No property found." It averred the death of Keiter, and that on the 7th of September, 1880, administration of his estate was granted to the sheriff, defendant to said writ.

Precisely the same pleadings were filed, the same facts agreed and the same action of the court was had thereon, and the same judgment against the plaintiff, as in the pre-

ceeding case, and Sherrard's administrator obtained this writ of error.

For the reasons given in the opinion in that cause the judgment upon the *scire facias* must be reversed with costs to plaintiff in error, the plaintiff's demurrer to the defendant's plea sustained, and the plea rejected, and the cause is remanded to said Circuit Court for further proceedings therein.

REMANDED.

CHARLESTON.

TAYLOR'S EX'RS v. COX.

Submitted January 14, 1889.—Decided February 11, 1889.

PRINCIPAL AND SURETY—ATTACHMENT—APPEAL—CONTINUANCE.

J. O. C., W. C., and T. executed a note to one Susan Spiller, in which J. O. C. was principal, and the others were sureties. Suit was brought on said note, and satisfaction was obtained out of the property of T. in the county of Tazewell. During the pendency of proceedings to enforce the collection of said note, T. died, and W. C. and A. G. C. transferred to the executors of T. two several notes made by M. to W. C., for \$3,100.00 each, which purported to be secured by vendor's lien on certain lands, which had been conveyed to M. by said W. C. and A. G. C., to indemnify the estate of T. for the amount recovered from it by said Susan Spiller. Suit was brought by the executors of T. to enforce said vendor's lien, but it proved unavailing, for the reason that the proceeds of the land, when sold, were absorbed almost entirely by prior liens thereon, which existed against W. C. and A. G. C. Said executors obtained judgment on one of said notes in Washington county, where M. resided, and sought to prove said judgment, which was in the name of W. and A. G. C., for the use of said executors in a chancery suit pending in said county, but it was rejected both by the commissioner and the court. Said executors and the devisees of T. then brought a suit in equity in the Circuit Court of McDowell county in this state in the nature of a foreign attachment, to subject the lands of J. O. C. therein situated to the payment of the amount, which the estate of T. had paid for him as surety, and also the amount, which had been recovered from T. in his lifetime. An attachment was sued out and levied on said lands, and an order of publication taken and executed against the defendants. W. C.,

one of the defendants, appeared and required security for costs, which was given, made a motion to quash the attachment, which was sustained, demurred to the bill and filed his answer in October, 1877; and at the October term, 1884, of said Circuit Court, a decree was rendered against the defendants for the amounts claimed in the bill; and the lands of J. O. C., which had been levied on under an attachment, were directed to be sold under the attachment-lien. Afterwards the defendant J. O. C. appeared, petitioned for a rehearing, and said decree was set aside, and he filed his answer. The court sustained the demurrer; allowed the plaintiffs to amend at bar, gave a personal decree against the defendant J. O. C., and held that the plaintiffs had a lien by virtue of said attachment, and directed a sale of said lands to satisfy the plaintiffs' claim. **HELD:**

I. The notes transferred to the executors of T. by W. C. and A. G. C. having proved worthless by reason of a failure of consideration, the question of diligence on the part of said executors is not material in this case. (p. 183.)

II. Although an attachment sued out in this case appears to have been quashed, yet, the decree of the court below reciting, that the cause was heard upon the attachment duly levied upon the lands of J. O. C., in this Court said attachment must be taken to have been in full force and effect, duly sued out and levied as required by statute. (p. 164.)

III. Under the circumstances of this case it was not incumbent on the executors of T. to appeal from the decision of the Circuit Court of Washington county rejecting the judgment in their favor against M. before resorting to the property of J. O. C. for reimbursement. (p. 158.)

IV. The demurrer to the bill having been sustained, and the plaintiffs having amended at bar, and the defendants neither asking delay nor demurring to the bill as amended, there was no good reason for delaying the hearing of the case. (p. 158.)

A. W. Reynolds, J. H. Fulton and J. W. Caldwell for appellants.

D. E. Johnston and Chapman & Gillespie for appellees.

ENGLISH, JUDGE:

This is an appeal from the Circuit Court of McDowell county, which, the appellants claim, involves a question of proper diligence on the part of the plaintiffs below and appellees in the collection of certain notes, which were placed in the hands of J. T. Frazier, one of the executors of J. W. Taylor, deceased, as collateral security for the payment of a

judgment obtained by Susan Spiller against William Cox and J. W. Taylor for the sum of \$2,613.00 with legal interest thereon from the 2d day of August, 1858, and costs \$11.93, credited by \$600.00 paid May 1, 1859, and by \$48.02 paid November 25, 1861, which judgment was obtained in the County Court of Wythe county on the 16th day of August, 1867, and also to secure a judgment for the same amount rendered by said court in favor of Susan Spiller against James O. Cox on the 16th day of November, 1867, said parties having been sued jointly, but process having been served on them at different times.

The collaterals above mentioned consisted of two notes executed by one T. G. McConnell to Aug. G. Cox and William Cox, each for the sum of \$3,100.00 dated the 12th day of January, 1872, and payable with interest from October 1, 1871, and falling due respectively on the 1st days of October, 1873 and 1874. It appears that a writ of *fieri facias* issued from the office of the clerk of the County Court of Wythe county on said judgment, directed to the sheriff of Tazewell county, Va., and that by virtue of said writ the sheriff of Tazewell county sold personal property of John W. Taylor sufficient to realize the sum of \$262.50, which was entered as a credit on said writ as of the 12th day of April, 1870; and on the 5th day of May, 1870, the said Susan Spiller instituted a chancery suit in the County Court of Tazewell county against A. G. Cox, William Cox and John W. Taylor, to subject the real estate of John W. Taylor, located in that county, to the payment of said judgment obtained by her against them in the County Court of Wythe county, and such proceedings were had therein, that a decree for the sale of the lands of said John W. Taylor was obtained to satisfy said judgment.

Subsequent however to the rendition of said decree and during the pendency of said suit the said John W. Taylor died, and the suit was revived against his executors and heirs at law, and on the 1st day of April, 1873, the lands of the estate of John W. Taylor, deceased, were sold to pay off said judgment of Susan Spiller obtained in the county of Wythe against said James O. Cox, William Cox, and John W. Taylor.

On the 5th day of February, 1873, William Cox and A. G. Cox assigned and transferred to J. T. Frazier, one of the executors of said John W. Taylor, the collaterals above mentioned with authority to him to use them, so far as they would pay the said two judgments of Mrs. Spiller rendered as aforesaid against James O. Cox, A. G. Cox, William Cox, and John W. Taylor.

In order to recover from said James O. Cox and William Cox the amount, which the estate of John W. Taylor was compelled to pay as surety for said James O. Cox, the executor and heirs at law of John W. Taylor, deceased, instituted this suit in the County Court of McDowell county, W. Va., to subject two tracts of land alleged to be the property of said James O. Cox—one containing 9,988 acres, and the other 1,730 acres—situated in said county of McDowell, to sale for the payment of said amount and also the amount realized from the personal property of said John W. Taylor under said writ of *fiery facias*.

The defendants, William Cox and James O. Cox, both answered the plaintiffs' bill, and both claim, that the plaintiffs have no right to subject the lands of James O. Cox to sale to satisfy the claim asserted in the plaintiffs' bill, because, they say, after the death of said John W. Taylor but before the sale of the lands descended from or devised by him to plaintiffs, A. G. Cox and William Cox, transferred to J. T. Frazier, who was one of the executors of said John W. Taylor, and who qualified as such, two several notes above mentioned as collaterals, which notes were the second and third notes executed by said McConnell for the purchase-money of a tract of land situated in Wythe county, Va., on the waters of Cripple creek, which notes were so assigned as collateral security to indemnify the estate of said John W. Taylor for a certain amount of money, which the estate of said John W. Taylor was liable for as security for said J. O. Cox; and the defendant, J. O. Cox, claims, that, if due and proper diligence had been used in the collection of said collaterals, more than enough could have been realized to reimburse the said estate of John W. Taylor for the amount afterwards paid in discharge of the liability of said John W. Taylor as surety for said J. O. Cox.

The evidence in this cause in my opinion does not disclose the fact, that any want of diligence on the part of the personal representatives of said John W. Taylor prevented them from realizing the amount of money mentioned in the aforesaid notes. If it is true, that judgments might have been obtained on these notes at an earlier day than they were obtained, yet the failure to collect these notes or either of them and to make them available for the purposes, for which they were intended, to wit, the reimbursement of the estate of John W. Taylor, deceased, to the extent of the amount paid by said decedent's estate to Susan Spiller, was not caused by delay in bringing said suits upon said notes. When judgments were obtained on said notes, T. G. McConnell owned a large amount of real estate in the counties of Tazewell, Wythe and Washington in the state of Virginia, against which said judgment-liens could have been enforced, and which were ample to pay off and satisfy said judgments and all prior existing liens upon them, if said judgments were valid and binding.

Judgment on the note for \$3,100.00, which fell due on the 1st day of October, 1873, was obtained in the Circuit Court of Washington county, Va., where the defendant T. G. McConnell resided, at the May term, 1874. Execution was issued upon the judgment and returned "No property found," by the sheriff of Washington county. In December, 1874, a chancery suit was brought in the Circuit Court of Wythe county against said McConnell by the executors of said J. W. Taylor for the purpose of subjecting to sale the land sold to said McConnell by William and A. G. Cox for the satisfaction of said judgment, and enforcing the vendor's lien as to said last note; and on the 6th day of March, 1875, a decree was obtained in said court in favor of said Taylor's executors for the sum of \$6,200.00, and the sale of said land was directed.

It seems however, that in the month of February, 1874, one Adam Groseclose brought a chancery suit in the Circuit Court of Wythe county, Va., to enforce certain liens against said tract of land sold by said William and A. G. Cox to said Thomas G. McConnell, which liens existed against said McConnell's land and were prior to the sale made by said

William and A. G. Cox to T. G. McConnell, and the said suit in chancery brought by the executors of J. W. Taylor was consolidated therewith, and such proceedings were taken in said suits, that a decree was rendered therein directing a sale of said land to satisfy said liens, which were prior and superior to the vendor's lien reserved by said Coxes in their conveyance to said McConnell; that said tract of land was sold by a commissioner appointed by said court, and brought \$4,000.00 and after satisfying said prior liens, which existed against said lands at the time said T. G. McConnell purchased it, the entire purchase-money was absorbed and consumed, with the exception of about \$209.00. At that time said T. G. McConnell was the owner of several other tracts of land situated in the county of Wythe, Va., and continued to own said lands for several years thereafter, as is shown by the deed of trust dated the 1st day of September, 1876, executed by said McConnell to John G. Kreger, trustee, on the land conveyed to him by Isaac Painter and Eveline Painter. The land was afterwards sold on the 8th day of March, 1880, by said Kreger, trustee, and at said sale David G. Thomas, the *cestui que trust*, became the purchaser, and he afterwards sold the same to Crockett & Co., of Wythe county, for \$6,000.00, which sales took place without objection on the part of any of the judgment-creditors of McConnell; and, if any objection had been made by the executors of John W. Taylor, they would have been unavailing, for the reason that the consideration for the obligations, on which the judgments had been obtained by said executors, had failed by reason of prior liens upon the land, for which they were executed by said McConnell to said Coxes, and this is mentioned merely to show, that, if the judgments obtained by said executors of Taylor had been valid, there was plenty of property to satisfy them, and that they were not lost by want of diligence on the part of said executors.

About this time or shortly afterwards the Lynchburg Insurance & Banking Company and others instituted a chancery suit in the Circuit Court of Washington county, to subject the lands of said T. G. McConnell in that county to the satisfaction of certain judgment-liens set forth and described in their bill, and in January, 1878, said cases were referred to a com-

missioner to ascertain the liens existing on said lands and their priorities. L. T. Casby, one of the commissioners of said court, took said account, and during the time he was taking the same, the judgment of William and A. G. Cox for the Use of Frazier and Smith, Executors of the Estate of John W. Taylor, deceased, against T. G. McConnell, obtained as aforesaid in the county of Washington at the May term, 1874, for the sum of \$3,100.00 with legal interest from the 1st day of October, 1871, till paid and costs \$10.77 was presented before said commissioner, and the plaintiffs sought to have it allowed in accordance with its date and priority in said account, but an exception was filed to the allowance of said judgment as a lien to be satisfied in said suit, "because said judgment was rendered against said McConnell upon a note for the purchase-price in part of a tract of land in the county of Wythe sold by said Coxes to him, and after said sale to said McConnell the tract of land was sold for liens upon said land against the said Coxes, which were entitled to preference over the claim of McConnell as purchaser, which prior liens were mostly for purchase-money due from said Coxes on said land, and by reason of these liens said land was wholly lost to said McConnell, and it would be inequitable to subject the lands of said McConnell to the payment of said judgment;" and the record in the case of *Groseclose v. Cox, et al.* from the Circuit Court of Wythe county was presented before said commissioner in support of said exception, which exception was sustained by the commissioner, and his action was confirmed by the court, for reason that the subject, which was the consideration of such judgment, had been lost to said McConnell.

On the 26th day of June, 1877, the executor and heirs at law of John W. Taylor, deceased brought a chancery suit in the Circuit Court of McDowell county against James O. Cox and William Cox, the object of which was to subject two tracts of land situated in said county and belonging to the defendant James O. Cox, to the payment of a debt due said executor of the estate of John W. Taylor, deceased, the sum of \$262.50 with interest thereon from the 2d day of April, 1870, till paid and also a debt due plaintiffs from said James O. Cox for the sum of \$3,663.79 with interest thereon from

the 1st day of April, 1873, till paid. In said suit an order of attachment was sued out and levied upon the lands of said defendant, James O. Cox, and, the defendants being non-residents, an order of publication was taken and published against them. The plaintiffs in their bill allege the facts with regard to the execution of the note by the defendants James O. Cox, William Cox and John W. Taylor to Susan Spiller for \$2,613.00 with interest thereon from the 2d day of August, 1858; also as to judgment being taken upon said note against the makers thereof, and that an execution on said judgment was issued and directed to the sheriff of Tazewell county; and that \$262.50 were realized in said county out of the personal property of said John W. Taylor, by which amount said judgment was credited as of the 12th day of April, 1870. They also state the facts with reference to the lands belonging to the estate of John W. Taylor, deceased, situated in the county of Tazewell, being sold at the suit of said Susan Spiller to satisfy her judgment against said J. O. Cox, William Cox and John W. Taylor, and that said John W. Taylor died during the pendency of said suit, and that said land when sold was the property of the plaintiffs, John M. Smith and Margaret, his wife, Jacob T. Frazier and Maria, his wife, James C. Moore and Sarah E., his wife, and Julia S. Taylor, as devisees of John W. Taylor, and that the judgment of said Susan Spiller, for which said lands were sold, amounted to \$3,663.79. They also set forth the facts in regard to the transfer of said McConnell notes to J. T. Frazier, one of the executors of said John W. Taylor, as collateral security, with authority to use them so far as they would pay said judgment of Susan Spiller against J. O. Cox, William Cox and John W. Taylor; and they also state the efforts they made to collect said collaterals, and their failure to realize anything thereon. They then allege that the defendant, J. O. Cox, is the owner of the two tracts of land lying in McDowell county,—one containing 9,988 acres, the other 1,730 acres; that said James O. Cox is insolvent and is a non-resident residing in the state of Tennessee; and pray that said J. M. Smith as executor as aforesaid may recover of said J. O. Cox the sum of \$262.50 with interest thereon from the 12th day of April, 1870, and that the plaintiffs also recover the further sum of \$3,663.79 with in-

terest from the 1st day of April, 1873, being the residue of said judgment of said Susan Spiller, for the payment of which the lands of plaintiffs were sold as aforesaid; that they have a right to attach the lands of said J. O. Cox lying in said county of McDowell for the payment of said debts, he being a non-resident, and that they have sued out attachments against the lands aforesaid, which have been levied thereon.

The bill in this cause was filed at July rules, 1877, and security for costs was then required from plaintiffs. At August rules following the security for costs was given. At the October term, 1877, additional security for costs was required by the defendants and promptly given by the plaintiffs; and a motion was then made to quash the attachment issued in the cause, which motion was sustained. The defendants then tendered their demurrer to plaintiff's bill, and the defendant William Cox tendered his answer to the same.

At the October term, 1884, of said Circuit Court, a decree was rendered, in which it is recited, that the cause came on to be heard upon the bill and exhibits filed therewith, the attachment duly levied on the lands of the defendant J. O. Cox, the answer of William Cox and exhibits therewith, the replication to said answer, and the depositions taken and former orders in the cause, *etc.*; and said decree proceeds to decree in favor of the plaintiff John M. Smith, as executor, the sum of \$227.14 with interest from date of decree, and in favor of John M. Smith, in his own right, and the other plaintiffs the sum of \$3,663.79 with interest from the 12th day of April, 1873, till paid and costs,—holding that the plaintiffs have a lien on the lands of the defendant, James O. Cox, lying in McDowell county by reason of their attachment, and directing a sale of said lands by a special commissioner.

On the 9th day of April, 1885, James O. Cox appeared and presented his petition praying the court to restrain the plaintiffs and the commissioner from further proceeding under the decree of October term, 1884, and for a rehearing of the cause, which prayer was granted, and said petition was filed: and at the May term, 1886, said decree rendered at the October term, 1884, directing a sale of said lands was

set aside, and leave was granted said J. O. Cox to file his answer, which was accordingly done; and at a subsequent day the plaintiffs after objecting to said answer and having their objection overruled, replied generally thereto.

The answers of both James O. Cox and William Cox filed in this cause make no contest as to the validity of the plaintiffs' claims originally, but by way of avoiding and preventing a decree for the same they claim, that the executors of John W. Taylor's estate did not use due diligence in the collection of the MacConnell notes assigned to them as collaterals: that if the lands, for which the MacConnell notes were executed as part of the purchase-money were insufficient to pay the same or were absorbed by the payment of prior liens, they should have amended their bill filed in Wythe county and should have proceeded against the other lands of MacConnell lying in said county; that they were not parties to the proceedings in the courts of Washington and Wythe counties, and that said executors should have appealed from the decree of the Circuit Court of Washington county rendered on the 20th day of January, 1880, or notified the defendants thereof, so that they could have appealed; and that the plaintiffs, while holding said collaterals, could not proceed on their original claim.

It will be perceived, that the judgment of the Circuit Court of Washington county for \$3,100.00 with interest from the 1st day of October, 1871, till paid and costs, \$10.77, which bears date May, 1874, and was docketed October 21, 1874, and which was rejected by Commissioner L. T. Casby in ascertaining the liens upon the lands of T. G. McConnell in the chancery suit in Washington county, whose action was confirmed by the court, was a judgment in the names of William Cox and Augustus G. Cox, who sued for the benefit of Jacob T. Frazier and John W. Smith, executors of John W. Taylor, deceased, against said T. G. McConnell and William Cox, one of the defendants in this suit and the assignor of said McConnell. In the case of *Goodall v. Stewart*, 2 Hen. & M. 105, it was held, that a return of "No property found" on an execution against the obligor was sufficient to charge the assignor. In the case of *Wilson's Adm'rs v. Barclay's Ex'r*, 22 Gratt. 534, it was held, that it was the duty

of the assignee to diligently pursue a specific lien, before he can have recourse upon the assignor. In this case there was a vendors' lien, and that was diligently pursued until it was exhausted. It is however claimed by the defendants, that the executors of the estate of said Taylor should have appealed from the action of the Circuit Court of Washington county in refusing to allow said judgment against said McConnell to be proved in the case of *Lynchburg Ins. Co. v. McConnell and others*, in Washington county. That this was not a condition precedent to the right of recovering said judgment against the defendants seems to have been decided in the case of *Arnold v. Hickman*, 6 Munf. 15, where it is held, if a judgment of a county court be assigned, and afterwards reversed by a superior court of law, the assignee may thereupon sue the assignor without carrying the case to the Court of Appeals.

It appears, that the Circuit Court of McDowell county in its decree rendered at the October term, 1886, sustained the demurrer of James O. Cox to the plaintiffs' bill, and on their motion they had leave to amend at bar, which was accordingly done, and there was no demurrer or objection to the bill as amended; and the decree recites, that the cause came on to be heard upon the bill as amended and exhibits therewith filed, the attachment duly levied upon the lands of the defendant James O. Cox, the answers of William and James Cox and exhibits therewith filed and the replications thereto *etc.* Counsel for the appellants however insisted in their argument of this case that the court should have continued said case for one term, when the defendants' demurrer was sustained, and the plaintiffs were allowed to amend at bar. A sufficient reply to this claim consists in the fact, that no such delay was asked, and I do not understand such a delay to be in accordance with the practice in this State. The defendant, James O. Cox, had already filed an answer, which was responsive to the allegation inserted in the bill by way of amendment,—at least, the defendants seemed to so consider their answers, as they tendered no demurrer or answer to said bill as amended,—and the cause came on to be heard upon the bill as amended and the answers *etc.*

Under the circumstances detailed, I do not consider that

the Circuit Court of McDowell county erred in hearing said cause when it did, without further delay.

A question of some difficulty, and about which there has been considerable controversy both in the state of Virginia and in this State, is suggested by the fact, that the attachment sued out in this case and levied on the lands of the defendant James O. Cox, mentioned and described in the bill, was quashed by the court several years before the final decree was rendered, and, so far as appears from the printed record, no other affidavit was filed and no other attachment issued, and yet the final decree recites, that the cause came on to be heard upon the attachment duly levied upon the lands of the defendant James O. Cox, and holds, that the plaintiffs have a lien by reason of their said attachment on the 9,988 acres of land belonging to the defendant, James O. Cox, lying in McDowell county, and directs, that unless the sums herein decreed be paid within thirty days, the lands be sold by a commissioner therein named upon the terms and provisions therein set forth.

In the case of *O'Brien v. Stephens*, 11 Gratt. 610, the Court of Appeals of Virginia, acting upon a statute passed April 3, 1852, which is almost identical with ours, holds: "If an absent defendant does not appear in the cause, there can not be a personal decree against him, but the attached effects can alone be subjected; but, if he does appear, there may be a personal decree only against him, or there may be both a personal decree and a decree subjecting the attached effects." This is the language used in the fourth section of the syllabus in that case. Judge SAMUELS however in delivering the opinion of the court on page 618, says:

"The defendants however appeared and made defense; thereby putting themselves fully under the control of the court for every legitimate purpose in the cause. The attachment was intended to perform two several and distinct functions,—one to give the absent defendant notice of the suit brought against him. This mode of giving notice by levying on property was formerly in familiar use. In the case before us it became unnecessary to resort to this mode of notice, inasmuch as the absent defendant appeared and defended himself. The other function of the attachment is

to give complainants security for the payment of their demand. This operation of the attachment is wholly for the benefit of the complainants; if waived or omitted, it can in no wise injure the defendant, seeing that he has already had notice to defend himself and has acted accordingly. The complainants, if they elect to do so, may waive a part of their remedy and rely upon another part. They may therefore take a mere personal decree against the defendants before the court, which decree the court in virtue of its jurisdiction over the parties now before it may lawfully render, or they may hereafter resort to the remedy by attachment, seeing that the statute authorizes such resort after the suit is brought. * * * * "I am therefore clearly of opinion that the only decree complainants could have had against Stephens, if he had not appeared and made defense, would have been for satisfaction out of his property attached under the process provided by the statute of 1852."

Now, it will be perceived, that the claim asserted in the case of *O'Brien v. Stephens* was purely legal in its character, it being a suit upon a forfeited forthcoming bond; but the court holds, that the nature of the claim asserted, the residence of the defendant Stephens and the location of his property gave to the Circuit Court jurisdiction of the subject. In that case no attachment had been sued out or levied, but the court held, that the case stated in the bill was such, that the affidavit might be made and the attachment sued out after the bill was filed, and that the affidavit and attachment were not essential to the jurisdiction of the court, at the time the cause was heard on demurrer. In the case of *Cirode v. Buchanan*, 22 Gratt. 205, it seems, that a bill was filed in the Circuit Court of Smith county, Va., by an administrator, setting out a money decree obtained in the District Court of Chancery for the Northern district of Alabama, against one Frank A. Sanders, for \$12,271.49 and costs, in which bill the plaintiff sets up that said defendant has no property in Alabama, out of which said decree can be satisfied, but that he has a large and valuable real estate in the State of Virginia within the jurisdiction of the court, describing it as being an undivided interest in certain tracts of land situated in said county, and alleging that said Frank A. Saunders is

a non-resident of the State of Virginia, and stating the object of said suit to be to subject said undivided interest in said land to sale to pay said debt. The suit was contested by W. Y. Cirode, the assignee in bankruptcy of said Frank A. Sanders. This proceeding was under the act of 1852, amending the Code of 1849 by adding the following words at the commencement of section 11 of chapter 151, to wit: "A claim to any debt or to damages for breach of any contract against a person who is not a resident of this State, but who has estate or debts due him within the same, may, if such claim exceed \$20.00, exclusive of interest, be maintained in any court of equity for a county or corporation, in which there may be any such estate, or a defendant owing any debt to such non-resident."

Judge MONCURE, in delivering the opinion of the court, (page 215,) says: "The effect of this amendment was to give to a creditor having a legal claim against a debtor residing out of the State, and owning estate or effects therein, the same right to bring a foreign attachment suit in equity as he would have had before the Code of 1849; the only difference being that since the amendment he has had an election to sue at law or in equity in such a case, whereas before the Code of 1849 he could sue in equity only."

Now to the first section of chapter 106 of the Code of West Virginia, which provided, when and how an attachment might be sued out in a suit at law or in equity, and what affidavit was required to be made at the commencement of the suit or at any time thereafter and before judgment, an amendment was made, which was passed February 27, 1871, in the following words:

"Section 1 of chapter 106 of the Code of West Virginia is hereby amended by adding at the end thereof the following: 'A claim, whether legal or equitable, for any debt or liability arising out of contract against a foreign corporation or a non-resident of this state, may be sued for and recovered in a court of equity, and an attachment in any action at law or suit in equity may be sued out as provided in this section, whether the debt or demand be due or not; but the affidavit, in case the debt or demand be not due, shall show at what time it will become due.'" It will thus be perceived that

the statute under which the bill was filed and proceedings taken in the case at bar is very similar, if not identical, with the statute which Judge MONCURE is discussing in the case of *Cirode v. Buchanan*, and on page 216 he says: "The grounds for equitable relief in such a case are threefold: (1) That a debt is due to the plaintiff; (2) that the debtor is a non-resident of the state; (3) that he has estate or effects within the state."

All of these matters seem to have been clearly and properly alleged by the plaintiffs, J. M. Smith and others, and in addition thereto they allege, that they are entitled to recover the debt in the bill described, and that the only means they have of realizing said debt is to resort to the lands of James O. Cox, who is a non-resident of the State, and that they have a right to attach and subject said real estate belonging to said J. O. Cox lying in the county of McDowell to the payment of said debts. These allegations, if true, clearly entitle the plaintiffs to relief in a court of equity. In the case of *Coleman v. Waters*, 13 W. Va. 278, which was a suit in the nature of a foreign attachment, this court held:

When a court of equity has properly taken jurisdiction of a cause against an absent defendant, it must proceed to give relief according to the principles of equity, and, if the absent defendant appear and answer, there may be a personal decree only against him, or there may be both a personal decree and a decree subjecting the attached effects."

In that case, it is true, an order of attachment was sued out and levied, but a personal decree was taken against the absent defendant without subjecting to sale the estate attached. Judge HAYMOND, in delivering the opinion of the court in that case, quoted with approval the case of *O'Brien v. Stephens* above referred to holding, that, if the absent defendant does appear, there may be a personal decree only against him, or there may be a personal decree and a decree subjecting the attached effects; and if the debtor appears, and the attachment has not been sued out or levied, there may still be a personal decree against him; or the plaintiff may after the debtor's appearance make the affidavit, sue out an attachment and have it levied on the effects of the debtor and have them subjected: holding that, "at the time said

suit was commenced, to wit, on the 7th of October, 1872, and since, the law of this state relative to foreign attachments in equity against non-residents was and is the same substantially, as to matters in question in that case, as the law in Virginia under which said case of *O'Brien v. Stephens* was decided."

In the light of these decisions I am of the opinion upon the case presented by the record, that notwithstanding the fact, that the attachment issued in the cause was quashed, the Circuit Court of McDowell county had a right, even, if there was no attachment, after the appearance of the defendant, James O. Cox, to render a personal decree against him for the sum of \$6,507.40 in favor of John M. Smith in his own right and Margaret S. Smith, his wife, Jacob T. Frazier and Maria V., his wife, James C. Moore and Sarah E., his wife, and Henry Harrison, administrator of India Moore, deceased, with legal interest from the date of the decree, and costs.

But can it be held by this Court that there was no attachment in this case sued out and levied subsequent to the date of the decree at the October term, 1877, of the Circuit Court of McDowell county, which appears to have quashed the first attachment sued out in the case, in the face of two decrees rendered in said cause at subsequent dates, both of which recite, that the cause came on to be heard upon the attachment duly levied upon the lands of the defendant, James O. Cox? It is true, that the clerk of the Circuit Court in copying said record does not copy an affidavit or attachment of subsequent date to the decree quashing said first-named attachment; but the statute allows an attachment to be sued out after the institution of the suit at any time before judgment. Is it to be presumed, that the Circuit Court of said county would in two successive decrees recite the fact, that the case came on to be heard upon the attachment sued out and levied, if there was no such attachment? I think not.

In the case of *Moore v. Holt*, 10 Gratt. 284, it is held: "Where the decree states, that the order of publication against the absent defendant had been duly published, it is to be taken in an appellate court, that everything required by the statute has been done;" and in this case, the decrees stating

that the case was heard upon the attachment duly levied upon the lands of the defendant James O. Cox, it is to be taken that there was an attachment regularly sued out and properly levied upon said lands.

I am therefore of opinion to affirm the decree of the Circuit Court of McDowell county rendered in this case, except so far as it holds, that the sum of \$262.50 paid by John W. Taylor in his lifetime on the judgment of said Susan Spiller is barred by the statute of limitations and ought not to be recovered by John M. Smith, executor of said John W. Taylor; and in that respect said decree is reversed, as no plea of the statute of limitations seems to have been made or relied on in this case; and, this court proceeding to render such decree as should have been rendered by the court below in reference to the amount so paid by John W. Taylor in his lifetime, it is ordered, adjudged and decreed, that the defendant, James O. Cox, do pay to said John M. Smith, executor of John W. Taylor, deceased, the sum of \$522.11, the amount paid by said John W. Taylor in his lifetime as aforesaid, with interest added to the 6th day of October, 1886, the date of said decree, with interest thereon from that date, and that said sum be paid out of the proceeds of said land, when sold; and this cause is remanded to the Circuit Court of McDowell county for further proceedings to be had therein; and the appellants must pay the costs of this appeal.

REVERSED IN PART. REMANDED.

82	164
83	137
32	164
58	398
58	399
58	403

CHARLESTON.

RECE v. N. N. & M. V. Co.

Submitted January 11, 1889. Decided February 11, 1889.

CORPORATIONS—LEGAL EXISTENCE.

1. A corporation exists only in contemplation of law and by force of law and can have no legal existence beyond the state or sovereignty, by which it is created. (p. 170)

CORPORATIONS.

2. While a corporation by the same name may be chartered

by two states clothed with the same capacities and powers and intended to accomplish the same objects and be exercising the same powers and duties in both states, yet in law there will be two distinct corporations,—one in each state,—with only such corporate powers in each state, as are conferred by its creation in that state. (p. 171.)

CORPORATIONS—REMOVAL OF CAUSES.

3. One state cannot by a mere legislative declaration make all corporations created by charter or by the laws of other states domestic corporations of such state; at least it can not by such declarations deprive the foreign corporation of its right to resort to the Federal courts, 'in cases where such right is conferred by the constitution and laws of the United States. (p. 172.)

CORPORATION—RAILROAD COMPANIES—REMOVAL OF CAUSES—CONSTITUTIONAL LAW.

4. So much of section 30 chapter 54, of the Code of this State, as declares, that foreign railroad corporations doing business in this State shall in all suits and legal proceedings be held and treated as domestic corporations of this State, and requires every such corporation to file an agreement to that effect, is, so far as it attempts to deprive such corporation of the right to remove to the Federal courts suits brought by or against it in the courts of this State in cases, in which it would otherwise be entitled to such right, inoperative and void; and such foreign corporation may exercise such right in any proper case, notwithstanding it has executed and filed such agreement in pursuance of the provisions of said statute. (p. 173.)

J. H. Ferguson and Simms & Enslow for plaintiff in error.

Gibson & Michie for defendant in error.

SNYDER, PRESIDENT:

Action of trespass on the case, commenced June 29th, 1887, in the Circuit Court of Cabell county by Edna E. Rece, administratrix of T. H. Rece, deceased, against the Newport News & Mississippi Valley Company, to recover damages from the defendant for its negligence in causing the death of the plaintiff's intestate. There was a verdict and judgment thereon in favor of the plaintiff for \$5,000.00; and the defendant has obtained this writ of error.

The first error assigned is, that the Circuit Court improperly denied the motion of the defendant to remove the action to the District Court of the United States. The declaration was filed at the July rules, 1887; and at the same rules the

defendant filed its petition and bond under the act of Congress, passed March 3, 1887, to remove the action to the District Court of the United States for the district of West Virginia sitting at Charleston in said district and exercising Circuit Court powers. The petition was in proper form and alleged, that the matter in controversy exceeds \$2,000.00 and is between citizens of different states; that the plaintiff was at the commencement of the action and still is a citizen of the state of West Virginia; and that the defendant was and still is a citizen of Connecticut, where it was incorporated under the laws of said state, and that it is not a citizen of the state of West Virginia. At the August term, 1887, the plaintiff filed her answer, to which the defendant filed a written replication, and the court after overruling the respective motions of the plaintiff and defendant to reject said answer and replication for insufficiency decided, that the defendant by accepting the provisions of the Code of this State c. 54, s. 30, had become a corporation of this State, and denied the defendant's motion to remove the action to the District Court of the United States; and the defendant excepted.

The facts, upon which the court based its said ruling, as shown by the record, are as follows: Prior to the year 1886, the defendant, The Newport News & Mississippi Valley Company, was incorporated under the laws of the State of Connecticut with power to construct, buy, hold, own, lease, equip and operate any railroads, bridges, ferries, warehouses, telegraph and telephone lines, wharfs, steamboats *etc.*, in any State or Territory of the United States or foreign country, provided that said corporation shall not have power to lease, hold, own, or operate any railroad within the State of Connecticut. This proviso was by the General Assembly of Connecticut in January, 1887, amended by adding thereto these words, "unless such railroad shall be held, owned or operated within said State in conformity with the provisions of the general railroad laws of this State."

The said company prior to the date of the injury complained of in the declaration became the lessee of the road, property and franchises of the Chesapeake & Ohio Railway Company, a domestic corporation and citizen of this State; and at said date and since as well as on and prior to the 27th

day of July, 1886, the defendant company was engaged as a public and common carrier for hire of passengers and all kinds of freights from the town of Newport News in the State of Virginia in and through the State of Virginia and this State to the city of Lexington in the State of Kentucky as such lessee of the said Chesapeake & Ohio Railway Company and other railroad companies; and that it was then and still is operating a continuous line of railways and carrying on interstate commerce in and through the States aforesaid, having its principal offices in the city of New York in the State of New York and in the city of Richmond in the State of Virginia; and that the defendant company did on said 27th day of July, 1886, by a writing duly executed under its corporate seal and filed in the office of the Secretary of State of this State accept the provisions of the Code of this State, c. 54, s. 30, and agree to be governed thereby. The said section 30 is as follows:

“Any corporation duly incorporated by the laws of any state or territory of the United States, or of the District of Columbia, or of any foreign country, may, unless it be otherwise expressly provided, hold property and transact business in this state, upon complying with the requirements of this section, and not otherwise.” Then, after defining the powers and liabilities of such corporation, and prescribing the manner of filing its charter with the secretary of state *etc.*, the act proceeds: “Every railroad corporation doing business in this state under the provisions of this section, or under charters granted or laws passed by the state of Virginia or this state, is hereby declared to be, as to its works, property, operations, transactions, and business in this state, a domestic corporation, and shall be so held and treated in all suits and legal proceedings which may be commenced or carried on by or against any such railroad corporation, as well as in all other matters relating to such corporation. No railroad corporation which has a charter, or any corporate authority, from any other state, shall do business in this state as the lessee of the works, property, or franchises of any other corporation or person, or otherwise, or bring or maintain any action, suit, or proceeding in this state, until it shall, in addition to what is hereinbefore required, file in the

office of the Secretary of State a writing, duly executed under its corporate seal, accepting the provisions of this section, and agreeing to be governed thereby; and its failure to do so may be pleaded in abatement of any such action, suit, or proceeding; but nothing herein contained shall be construed to lessen the liability of any corporation which may not have complied with the requirements of this section, upon any contract or for any wrong."

The remaining portion of this section prescribes a penalty and the form of prosecution for the failure of the corporation to comply with the provisions thereof. No question is made as to the sufficiency of the bond or the time, at which the application for removal was made, or as to the form of the pleading, by which the question of the right of removal was presented.

The only controversy before us is, whether or not the facts above stated entitle the defendant to a removal of this action to the District Court.

It was suggested by the counsel for the defendant, that the provision of the statute is that "no railroad corporation * * * shall do business in this state as the lessee" *etc.*, and that, as the defendant does not purport to be a railroad corporation, the statute does not apply to it. This point was not pressed in the argument, and, I think, properly not; for, while the name of the defendant, The Newport News & Mississippi Valley Company, does not include the word "railroad," the said company is by its charter authorized to construct, hold, own, lease and operate any railroad, and the record in this case distinctly shows, that it is and was on July 26, 1886, doing business as a railroad company in this state, and that it must therefore be regarded as such within the intent of said statute.

In *Railroad Co. v. Koontz*, 104 U. S. 5, it was decided, that a foreign corporation operating a domestic corporation under a lease of the road, property and franchises of the latter does not thereby forfeit or surrender its rights to remove into the Circuit Court of the United States a suit instituted against it in a court of the state which chartered the leased corporation by a citizen of that state. In that case the lessor

company was a Maryland corporation and the lessee a Virginia corporation, and in its opinion the court says :

"It is not denied, that the Maryland company derived all its power, so far as the operation of the Virginia road was concerned, from the Virginia corporation; nor that, in respect to the business of that road, it must do just what was required of the Virginia corporation by the laws of Virginia, but that does not, in our opinion, make it a corporation of Virginia. * * * A corporation, therefore, created by and organized under the laws of a particular state, and having its principal office there, is, under the constitution and laws, for the purpose of suing and being sued, a citizen of that state, possessing all the rights and having all the powers its charter confers."

So in the case at bar the fact, that the defendant has leased and is operating the railroad of a corporation of this State, does not make it a citizen of this state within the meaning of the constitution and laws of the United States. By a statute of the state of Wisconsin enacted in 1870 it was declared, that "any fire insurance company, association or partnership incorporated by or organized under the laws of any other state of the United States, * * * desiring to transact any such business (fire insurance) by any agent or agents in this state shall first appoint an attorney in this state, on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the United States circuit court or federal courts, and file in the office of the secretary of State a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted." 1 Tayl. St. § 22, p. 959.

While this statute was in force, The Home Insurance Company, a corporation of New York, established an agency in the state of Wisconsin and in compliance with the requirements of said statute filed in the office of the Secretary of State of that state, a written power of attorney duly executed by said company, in which is contained this clause: "And said company agrees, that suits commenced in the state courts of Wisconsin shall not be removed by the acts of said company into the United States Circuit or Federal courts." After-

wards the company issued a policy of insurance to one Morse, and, a loss having occurred under it, Morse sued the company in one of the state courts of Wisconsin. The company appeared in the state court and filed its petition to remove the case under the act of Congress into the United States Circuit Court for the district. The state court refused to remove the case, and judgment was rendered by it for the plaintiff. This judgment was affirmed by the Supreme Court of Wisconsin (30 Wis. 496,) and from this latter court the company took the case to the Supreme Court of the United States, which held, that the aforesaid statute was repugnant to the constitution of the United States and the laws made in pursuance thereof, and that it was therefore illegal and void; and further that the aforesaid agreement executed and filed in pursuance of said statute is also void and afforded no ground for the refusal of the state court to remove said action to the Federal court. *Insurance Co. v. Morse*, 20 Wall. 445.

The substance of this decision is, that a foreign corporation by a positive agreement made in pursuance of a state statute does not destroy its right to remove a suit brought against it in the state court to the Federal court. Our statute (Code, 1887, c. 54, s. 30,) and the agreement of the defendant filed in pursuance thereof do not directly or in terms stipulate, that the foreign corporation shall or will not remove any suit from the state to the Federal courts; but the statute does declare, that the corporation filing such agreement shall be, "as to its works, property, operations, transactions and business in this state a domestic corporation and shall be so held and treated in all suits and legal proceedings, * * *

* as well as to all other matters relating to such corporation;" and thus it does indirectly take from the corporation the right to remove into the Federal courts any suit brought against it by a citizen of this State, because as a domestic corporation it can possess no such right. The question then arises: Does said statute make the defendant a corporation of this state?

The following propositions of law are settled by the decisions of the Supreme Court of the United States: *First*. A corporation exists only in contemplation of law and by force of law and can have no legal existence beyond the

bounds of the state or sovereignty, by which it is created. It must dwell in the place of its creation. *Second.* Where a corporation is created by the laws of a state, the legal presumption is, that all its members are citizens of the state, by which it was created; and in a suit by or against it it is conclusively presumed to be a citizen of such state. *Third.* A corporation endued with the capacities and faculties it possesses by the co-operating legislation of two states can not have one and the same legal being in both states. Neither state could confer on it a corporate existence in the other nor add to nor diminish the powers to be there exercised. *Fourth.* The constitutional privilege, which a corporation has as a citizen of one state to sue the citizens of another state in the Federal courts can not be taken away by simply declaring it to be a corporation of the latter state. *Railroad Co. v. Wheeler*, 1 Black, 286; *Marshall v. Railroad Co.*, 16 How. 314; *Insurance Co. v. French*, 18 How. 404; *Insurance Co. v. Francis*, 11 Wall. 210; *Railway Co. v. Whitton*, 13 Wall. 270; *Muller v. Dows*, 94 U. S. 444; *Railroad Co. v. Alabama*, 107 U. S. 581, 2 Supt. Ct. Rep. 432.

In *Muller v. Dows*, *supra*, the court decided, that "a corporation created by the laws of Iowa, although consolidated with another of the same name in Missouri under the authority of a statute of each state is nevertheless in Iowa a corporation existing there under the laws of that state alone.

The court in its opinion in *Railroad Co. v. Alabama*, *supra*, says: "The defendant, being a corporation of the State of Alabama, has no existence in this State as a legal entity or person, except under and by force of its incorporation by this State, and, although also incorporated in the State of Tennessee, must, as to all its doings within the State of Alabama, be considered a citizen of Alabama, which cannot sue or be sued by another citizen of Alabama in the courts of the United States."

In the opinion in *Railroad v. Wheeler*, *supra*, the court says: "It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the States of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of the State as one corporate body,

exercising the same powers, and fulfilling the same duties, in both States. Yet it has no legal existence in either State, except by the law of the State, and neither State could confer on it a corporate existence in the other, nor add to nor diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person which exists by force of law can have no existence beyond the limits of the State or sovereignty which brings it into life and endues it with its faculties and powers." 1 *Black*, 297.

The conclusion from these authorities is, that a corporation possessing the same name, powers, duties, franchises and purposes and composed of the same natural persons, if incorporated by two states, will be under the constitution and laws of the United States regarded and treated as two separate and distinct corporations of the respective States and not as one corporation existing in both States, and consequently no corporation of one State can be made a domestic corporation of another State by simply declaring that it shall be such. In order to make a corporation chartered by another State a corporation of this State, it must be chartered by this State. It will then be a domestic corporation of this State without reference to its charter in the foreign State with such powers, duties and franchises only as are conferred by the charter and laws of this State.

The defendant, The Newport News & Mississippi Valley Company, is conceded to be a foreign corporation created by the laws of the state of Connecticut, and it is not pretended; that it has been chartered as a corporation of this State, unless the statute under consideration, which merely declares, that it shall be a domestic corporation and so held and treated in all suits and legal proceedings, as well as in all other matters relating to it, makes it such. The most that can be said to be done by this statute, is, that it attempts to adopt or naturalize this Connecticut corporation and all other foreign corporations and make them domestic corporations and citizens of this state without either chartering them as corporations of this State by any special act of the legislature or requiring them to obtain a charter and organize

themselves into domestic corporations under the general laws of this State.

If we are to hold the defendant to be a domestic corporation of this State, then we have the anomaly, or rather the absurdity, of a corporation without a charter, because according to the settled law we cannot look to the foreign charter in order to ascertain the powers, duties and franchises of a domestic corporation but alone to the authority conferred by its domestic charter and the laws of this State. The evident purpose of that provision of our statute, which declares, that the foreign corporation shall be a domestic corporation "and so held and treated in all suits and legal proceedings, which may be commenced or carried on by or against it," was to prevent such corporation from removing suits brought by or against it in the courts of this State to the Federal courts. This provision, if applied to a foreign corporation, would be in conflict with the constitution and laws of the United States and therefore inoperative and void. *Insurance Co. v Morse*, 20 Wall. 445.

The defendant here being, as we have seen, a foreign corporation notwithstanding the declaration of our statute, that it shall be a domestic corporation, the said provision of the statute, so far as it attempts to take from the defendant the right to remove any suit to the Federal courts as well as the agreement filed by it in pursuance of said provision, must be held inoperative to prevent such removal in any suit, in which it would have the right of removal under the constitution and laws of the United States.

I am therefore of opinion, that the Circuit Court erred in denying the petition and motion of the defendant to remove this action for trial into the District Court of the United States, as prayed for in its said petition; and for said error alone the judgment of the said court is reversed, the verdict of the jury set aside, and the case is remanded to said Circuit Court with directions to it to enter the order required by the act of Congress in such cases, and to proceed no further in this case, unless its jurisdiction is restored by the action of the said District Court of the United States.

REVERSED. REMANDED.

CHARLESTON.

DAVIS v. LIVING.

*(GREEN, JUDGE, absent.)

Submitted January 21, 1889.—Decided February 16, 1889.

EVIDENCE—TAX DEED.

Under the provisions of the Code of 1868 of this State a tax-deed for land executed in 1870 by a deputy-recorder and duly acknowledged by him in his own name as such deputy is admissible in evidence in an action of ejectment for said land.

T. E. Davis for plaintiff in error.

C. Hall for defendant in error.

SNYDER, PRESIDENT:

Action of ejectment instituted in the Circuit Court of Ritchie county in May, 1885, by Thomas E. Davis against Jacob Living and others to recover 4,000 acres of land lying in said county. David McGregor and O. M. Brown were on their motion made defendants to the action in the place and stead of said Living and others. The case was tried by jury on the issue of not guilty, and a verdict was returned for the defendants, on which the court entered judgment. During the trial the plaintiff took two bills of exceptions, in the second of which all the evidence produced on the trial is made part of the record. The plaintiff obtained this writ of error.

The only question argued and insisted upon by the counsel for the plaintiff in error in this Court is presented by the first bill of exceptions. The plaintiff offered in evidence to the jury, as a part of his chain of title, a deed executed by G. H. Caldwell, deputy-recorder of Wirt county, to Peter P. Runyan and Johnson Litson, dated November 24, 1870, and duly admitted to record in said county on the same day by C. D. Fisher, recorder. Upon objection by the defendants the court refused to permit this deed to go to the jury as

*On account of illness.

evidence, on the ground that "a deputy-recorder has no authority to make a deed for land sold for taxes."

From the recitals in the said deed it appears that the tract of land thereby conveyed, to wit, 3,000 acres, situated in Wirt county, was on November 12, 1869, sold by the sheriff of said county for delinquent taxes charged thereon in the name of the Dutchman Oil Company for the years 1867 and 1868, and purchased by W. V. Vernon for \$125.82, the amount of said taxes *etc.* The said Vernon assigned his said purchase to the said Peter P. Runyan and Johnson Litson, to whom the land was conveyed as aforesaid. The grantor is described as "George Caldwell, deputy-recorder of Wirt county," and the deed is signed, "G. W. CALDWELL, Deputy-Recorder of Wirt county," and the acknowledgment is by said Caldwell as deputy recorder.

The Code of 1868 c. 13, s. 16, of this State, provides: "When a statute requires an act to be done by any officer or person, it shall be sufficient if it be done by his agent or deputy, unless it be such as can not lawfully be done by deputation." And section 11 of chapter 7 of said Code empowers the recorder, with the consent of the court or judge, to appoint any person his deputy; and then provides that "the deputy during his continuance in office may discharge any of the official duties of his principal;" and section 13 of said chapter declares, that, where a recorder dies during his term of office, his deputy in office at the time "may continue to discharge the duties of the office in the name of the deceased until the qualification of his successor." And section 14 is as follows: "The duties of the recorder, of a judicial character, shall not be performed by deputy, notwithstanding anything above contained to the contrary."

In *Pendleton v. Smith*, 1 W. Va. 16, it was decided, that all writs, process and attachments must be signed by the clerk or by his deputy, and, if by the latter, he must sign the name of the principal for the clerk. In this case, BROWN, J., dissented, he being of the opinion, that it was sufficient for the deputy to sign the writ in his own name. It seems to me, that the conclusion of Judge BROWN is the correct one, as it is not only in harmony with the statute-law but in accordance with the general usage and practice in all cases

of the acts of deputy-clerks. But, be that as it may, all the judges in that case agreed, that the act might be done by the deputy-clerk. The statute-law above quoted gives the deputy-recorder plenary power to discharge any of the official duties of his principal, with the single exception, that he shall not do so, when the duties are of a judicial character.

The form, in which the deputy shall designate his acts or sign official papers, is not defined except that, when he acts after the death of his principal, he is required to discharge the duties of the office in the name of the principal. If this latter requirement can be understood to require the deputy to sign official papers in the name of his principal, it could only apply to acts done when the principal was dead; because, if the statute required such signing in all cases, there was no necessity or propriety for this special requirement. It is very certain that the execution of a tax-deed is a ministerial not a judicial duty, and therefore a duty, which may under the statute be performed by a deputy-recorder. Under the statute-law of Virginia, which was at that time substantially the same as our statutes in regard to the powers of a deputy to act for his principal, the Court of Appeals of that state in *Flanagan v. Gimmet*, 10 Gratt. 421, held, that a tax-deed made by a deputy-sheriff for land sold by the sheriff of the county was legally executed and admissible in evidence in an action of ejectment for the land conveyed by such deed.

It is insisted by the defendant in error, that this deed was properly rejected because the plaintiff failed to prove, that G. W. Caldwell was in fact the deputy-recorder, at the time he executed the deed. The statute covers this objection. It declares, that the deed, when executed, shall be conclusive evidence against all persons other than the former owner of the land sold for taxes, that the person named in the deed as recorder was such. Code, 1868, c. 31, s. 29.

For the reasons aforesaid I am of opinion, that the judgment of the Circuit Court should be reversed, the verdict of the jury set aside, and the case remanded for a new trial.

REVERSED.—REMANDED.

CHARLESTON.

STATE v. GOODWIN.

(*JUDGE GREEN, absent.)

Submitted January 22, 1889.—Decided February 16, 1889.

32	177
49	601
32	177
52	151
32	177
162	492

1. EVIDENCE—WITNESS—IMPEACHMENT.

To impeach a witness by proving statements of his on another occasion inconsistent with or contradicting his statements on the trial, the statements must be material to the case, not collateral. (p. 181.)

2. EVIDENCE—WITNESS—IMPEACHMENT.

If the statements be collateral to the case and be drawn out on cross-examination and not in chief, the party drawing them out is bound by the answer and can not introduce evidence to contradict it. (p. 181.)

3. EVIDENCE—WITNESS—IMPEACHMENT.

Before such evidence to impeach can be admitted, a foundation must be laid by an examination of the witness touching the fact of his having made such statements. (p. 182.)

J. F. Laird, J. Hutchinson and W. C. Mann for plaintiff in error.

Attorney-General Alfred Caldwell for the State.

BRANNON, JUDGE:

This is a writ of error to a judgment of the Circuit Court of Wood county sentencing James Goodwin to the penitentiary for two years upon an indictment against him and John Freed for breaking into a spring-house of J. A. Murray with intent to commit larceny and committing it. The State introduced evidence to show, that the spring-house had been broken into, and some butter, some milk, a crock, a china dish and a china saucer stolen and carried to a houseboat lying in the Ohio river, occupied by John Freed with his family, James Goodwin and his wife and children and Richard Goodwin and his wife; Freed occupying one end,

*On account of illness.

the Goodwins the other ; and that some of the butter, the dish, the saucer and some milk were found on this boat. The breaking occurred in the night. On the trial Mrs. Frances Freed was a witness for Goodwin, who was tried alone, and her evidence in chief was as follows :

"I am the wife of John Freed. James Goodwin, my little son, and my husband left the boat about sundown, to go down to the fish-line. I was there when they returned home about dark. James Goodwin brought two rolls of butter. His wife gave me one of the rolls next morning. I recognize this meat-dish. We have owned it for some time. I was on the boat when Mr. Beckwith searched it. They got parts of two rolls of butter, this meat-dish and two saucers. They found about one pint of milk, which was in a bowl. They found no butter except the two rolls." On cross-examination she stated : "My husband did not leave the boat that night. James Goodwin and my husband returned about eight o'clock or half past eight. Jim reached the butter to his wife. I saw no milk. They had no milk with them, when they came back. I sent my little boy after milk for my baby. I don't know from whom he got it. He would go and get it as I wanted it."

Prisoner claimed and stated, that he left the boat with the boy and Freed to go to a fish-line, and his wife had given him some money, telling him to buy some meat or butter, and while gone from the boat he met a man, who sold him two rolls of butter of about one pound each for fifty cents, which he took to the boat.

The State, on cross-examination, asked Mrs. Freed, whether she had a conversation with Lucy Smith, and whether she did not tell her, that she (Freed) had said to her husband, after he and Jim Goodwin came back that night with the butter, that "that was a dang big lot of butter for fifty cents," and that he had told her to hush ; that he did not buy the butter, but that Jim Goodwin and the little boy went out and got the butter and milk while he watched the skiff ; to which question the prisoner objected, but the court allowed it, saying it was proper in order to lay a foundation to impeach the credibility of the witness in regard to facts testified to by witness in chief and for no other purpose. The witness

stated, that she had never had any such conversation with Lucy Smith. The state then asked her, if she did not tell Lucy Smith in the presence of Mrs. Rider, that those damned Goodwins had got her son Charlie drunk to make him tell, and that Jim Goodwin and Dick Goodwin were going to turn State's evidence and get out, and then send her husband to the penitentiary; and whether she did not say in the same conversation, that her husband was an innocent man, and that that damned Jim Goodwin had left her husband in charge of the skiff, and that Goodwin had taken her son and gone and stolen the butter and milk, and that her husband had nothing to do with it, and that she thought they ought to punish the guilty, and let her husband go.

Prisoner objected to the question; but the court allowed it, on the ground that the question was proper to lay ground to impeach Mrs. Freed, as it went to credit of witness, but for no other purpose. The witness then emphatically denied, that she ever had any such conversation with Lucy Smith.

The State then asked her, if she did not have conversation with Mrs. Rider in regard to her troubles, and if she did not state, that Jim Goodwin and Dick Goodwin were going to turn State's evidence and send her husband to the penitentiary, and if she did not say to Mrs. Rider, that her husband was innocent, and that nigger, Jim Goodwin, and her son Charlie stole the butter and milk; and if she did not at the same time state, that she dropped the crock the milk came in into the river, and it was a good thing that she did; that she could prove the dish was hers, and Mrs. Goodwin would claim the saucer, and they could not have the crock there in evidence against them in court.

The prisoner objected, the court allowing the question for the same reason stated above, and prisoner excepted. The witness, Mrs. Freed, answered that she had never made any such statements to Mrs. Rider.

The State introduced Lucy Smith, who stated that Mrs. Freed came to her house crying and in great trouble and said, they had been getting Charlie drunk, and that they were going to get him into trouble; that her husband was innocent; that Jim Goodwin had stolen the butter and milk; that when they came home that night she called her husband

to one side and said : "That's a danged lot of butter to get for fifty cents," and that she was afraid she would get into trouble ; that her husband then told her, that he did not buy the butter or milk, but that Jim Goodwin and Charlie had gone and got the things, while he watched the skiff ; that she (Mrs. Freed) said they threw the milk-crock into the river, and they could not find anything to hurt them much ; that Mrs. Goodwin claimed the china saucer as hers, and she (Mrs. Freed) would prove the other dishes were hers ; that the crock was out of the way, or they would have it in evidence against them ; but she heard Jim and Dick Goodwin were going to turn State's evidence, and send her husband to the penitentiary.

Prisoner objected to this evidence, but the court allowed it for the purpose of impeaching and contradicting her as to her testimony in chief, and for no other purpose : and prisoner excepted.

The State introduced Mrs. Rider, who stated she was at Lucy Smith's and heard the talk between them ; that in a day or two she went down to see her (Mrs. Freed) ; that she told her all her troubles ; that she said they had brought the butter and milk to the boat, but her husband had nothing to do with it ; that Jim Goodwin and her boy had gone and got the things, and her husband did not leave the skiff ; that they had thrown the crock into the river, but that Jim Goodwin had stolen the things, and he and Dick were going to turn State's evidence and send her husband to the penitentiary.

Prisoner objected to this evidence. The court allowed it, saying it was proper to impeach Mrs. Freed as to facts testified to by her in chief.

The prisoner asked but was refused the following instruction, for which he excepted : "The jury are instructed, that the testimony of Mrs. Lucy Smith and Mrs. Rider in regard to the conversation with Mrs. Frances Freed, in the absence of James Goodwin is not evidence of any fact mentioned by them and only relevant as to the credibility of Mrs. Freed, and can not be considered as proving any fact bearing upon the guilt of the defendant."

Lucy Smith's evidence is not admissible. Her statement,

that Mrs. Freed said, her husband was innocent, and that Jim Goodwin stole the butter and milk, was simply Mrs. Freed's expression of opinion. Her statement, that Mrs. Freed said, that, when they returned to the boat that night, she called her husband aside and said—"That's a danged lot of butter to get for fifty cents"—is not admissible. True, Mrs. Freed stated in her evidence, that Goodwin brought to the boat two rolls of butter, but she did not say, whether they were large or small, whether one pound each, or whether they would make up the quantity lost. They might have been large,—sufficient to make up the quantity. Here was no clear contradiction of her own evidence. Mrs. Freed's statement to Lucy Smith, that her husband responded, that he had not bought the butter or milk, but that Jim Goodwin and Charlie had gone and got the things, while her husband watched the skiff, was improperly admitted, because it was simply a declaration of Freed in the absence of the prisoner after the commission of the act; and, were Freed and Goodwin co-conspirators, the declaration of one made after the consummation of the act would not be admissible. 1 Greenl. Ev. § 111.

To impeach a witness by showing, that on another occasion he made a statement contradicting one made on the trial, that statement must relate to a matter material to the case,—must concern a fact involved in the evidence. There was not and properly could not have been involved in the case or in the evidence given any question, as to what Freed said as to the transaction after its consummation. The witness had stated nothing in chief to make it fall under the rule of *Forde's Case*, 16 Gratt. 547, that a witness may be impeached as to a matter, though collateral, if the statement be made in chief; nor could the State have introduced, to support the issue on its side as evidence independent of impeachment purposes, proof of the declaration so made by Freed; and for that reason it could not be let in to contradict a witness as to this collateral and irrelevant matter; for when a witness is cross-examined on a matter collateral to the issue, his answer can not be subsequently contradicted by the party putting the question. The test of whether a fact inquired of on cross-examination is collateral, is this:

Would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea? This limitation however applies only to answers on cross-examination. It does not affect answers to the examination in chief. Whart. Crim. Ev. § 484; *Forde's Case*, cited above; *Nuckols v. Jones*, 8 Gratt. 267.

There is in Lucy Smith's evidence other matter objectionable, and that is the language: "That she (Mrs. Freed) said they threw the milk crock overboard into the river, and they could not find anything to hurt them much; that Mrs. Goodwin claimed the china saucer, and she (Mrs. Freed) would prove the other dishes were hers; and that the crock was out of the way, or they would have it in evidence against them." This matter would, *per se*, be competent as inconsistent with her statements on the trial, and the general drift of her testimony of the prisoner's innocence, and particularly tending to contradict her statement that, when they returned to the boat, they brought no milk, and inferentially from other statements no dishes, by proving that she said the crock had been there, but was disposed of as evidence, and the presence of the dishes would be explained; but the objection is, that no foundation for this evidence had been laid by an examination of Mrs. Freed as to the fact of her having made such statements, which is indispensable. 1 Greenl. Ev. § 462; *Unis v. Charlton*, 12 Gratt. 484.

True, a foundation was laid as to a part of her statement, but not as to the particular part specified, which is separable from the other part. A foundation was laid as to this matter in examining Mrs. Freed as to her conversation with Mrs. Rider, but not in examining her as to her conversation with Lucy Smith. A foundation should be laid as to all the substantial or material matters, as to which it is proposed to contradict a witness, not merely a part of such matters, leaving a material part without the preliminary foundation.

Mrs. Rider's evidence as to the conversation in Lucy Smith's evidence is, for reasons stated as to the latter's evidence, incompetent. Her statement, that Mrs. Freed said, they brought the milk to the boat, is incompetent. Her statement, that Jim Goodwin and her boy went and got the things, is incompetent. Her statement, that they had thrown

the crock into the river, is admissible, but not her statement, that Jim Goodwin had stolen the things, and that he and Dick were going to turn State's evidence, and she thought they ought to send the guilty persons who stole the things. Mere opinion is not admissible in such cases. The evidence so improperly admitted was calculated to injure the prisoner's defence.

The instruction refused, while not couched in very plain or accurate language, yet properly construed was unobjectionable, and as an additional guard against the misuse by the jury of the evidence of Lucy Smith and Mrs. Rider in applying it, not merely on the question of the credit of those witnesses, but to establish the main fact of the prisoner's guilt, should have been given; but as the court had in admitting the evidence of these witnesses distinctly stated, that it was to be used only on the question of the credibility of Mrs. Freed, the judgment would not for that cause be reversed.

As to the motion for a new trial, because the verdict was contrary to the evidence, the case was tried by a jury and depended on the weight of testimony, credibility of witnesses and inferences and deductions from facts proven, of which the jury, not the court, were the proper judges; and this Court will not set aside a verdict in such cases except where there is a plain deviation from right and justice, not in a doubtful case. *State v. Cooper*, 26 W. Va. 338. We could not for this cause set aside the verdict.

For reasons however above given the judgment and verdict are to be reversed and set aside, and a new trial awarded, wherein, if the same matters shall arise, the principles herein indicated shall be applied, and the cause is to be remanded to such Circuit Court for such new trial.

REVERSED. REMANDED.

CHARLESTON

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51 617

KEY v. HUGHES'S EX'RS.

*(GREEN, JUDGE, absent.)

Submitted January 18, 1889.—Decided February 16, 1889.

1. TRUSTS AND TRUSTEES.

A trustee acting strictly within the line of his duty and exercising reasonable care and diligence will not be held responsible for the loss or depreciation of the trust-fund or the insolvency or misconduct of any person, who may have possessed it; but if that line of duty be not strictly pursued, and any part of the fund be invested upon securities not authorized or be put within the control of persons, who ought not to be intrusted with it, when there is no necessity for so doing, and a loss be thereby eventually sustained, such trustee will be liable to make it good however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive. (p. 188.)

2. TRUSTS AND TRUSTEES—EXECUTOR.

An executor is directed by will to invest a specified sum of money in interest-bearing bonds and pay the interest thereon to a legatee for life and after her death to divide the fund among her children. The executor applied to the cashier of a bank, who agreed to sell him United States bonds, but without seeing the bonds or knowing, that they were in the bank, the executor paid the cashier for them with the understanding, that they were to be held by the bank subject to his order. No bonds were in fact ever put in the bank on special deposit in the name of the executor or as his property, but the cashier paid to him, as the interest matured on such bonds, a sum equal to their interest. No inquiry was made by the executor for the bonds until after the failure of the bank nearly two years thereafter, when it was ascertained, that there were no bonds there; and if such bonds had ever been deposited there, they had been appropriated by the cashier long before the failure of the bank. *Held*.—The executor is liable for the trust-fund. (p. 191.)

3. TRUSTS AND TRUSTEES.

Where the relation of parties is that of trustee and *cestui que trust*, the statute of limitations does not commence to run, until there has been an open denial and repudiation of the trust by the trustee brought home to the *cestui que trust* in such a manner as will require the latter to act as upon an asserted adverse title. (p. 192.)

*On account of illness.

H. M. Russell for appellants.

J. R. Holt for appellees.

SNYDER, PRESIDENT :

Appeal from the decrees of the Circuit Court of Ohio county, pronounced in a suit brought September 11, 1886, by Mary Key and her children against the executors of Thomas Hughes deceased. The plaintiffs' bill avers, that Mary Leech late of the city of Wheeling by her last will directed her executor, the said Thomas Hughes, to set apart \$5,000.00 of her estate and invest the same in interest-bearing bonds and pay the interest or dividends derived therefrom to Mary Key during her life, and at her death to divide the principal equally among the children of said Mary; that said Hughes on July 13, 1868, duly qualified as such executor, set apart said \$5,000.00, and after paying the United States succession tax there remained in his hands as a trust-fund for the plaintiffs \$4,807.76, which he in July, 1869, invested in United States bonds of the par value of \$4,500.00 the premium thereon being at that time \$307.76; that from time to time the executor paid to the plaintiff, Mary Key, the interest on said bonds, but since the year 1873 she has never received any statement of account from the executor, nor has he made any settlement before any commissioner or court, showing such account; that he claimed to have deposited said bonds for safe-keeping in the Wheeling Savings Institution, a bank doing business in the city of Wheeling up to about the month of February, 1871, when it became insolvent and ceased to do business; that the executor claimed that by the failure of said bank the said bonds had been wholly lost, but that this claim was not made until April, 1873, more than two years after the alleged loss; that the plaintiffs have no information other than the mere statement of the executor, whether or not said bonds were in fact ever deposited in said bank, and they insist, that until it is shown, that said bonds were lost without the fault of the executor, his estate is liable therefor; that in April, 1873, said executor represented, that he had procured from the treasurer of said bank some securities, from which something might be

realized, and that he would advise the plaintiff, Mary Key, as to the facts, but he wholly failed to do so; that notwithstanding the claim of the executor, that said fund had been lost, he has from year to year paid to the plaintiff, Mary Key, at various irregular times sums of money on account of said trust-fund, his last payment having been made in November, 1885; that in March, 1886, the said executor died testate, and the defendants on March 19, 1886, duly qualified as his executors. The prayer of the bill is, that the estate of said Thomas Hughes, executor as aforesaid, may be held liable for said trust-fund; that a trustee may be appointed to hold and invest and dispose of said fund, as directed by the will of said Mary C. Leech; and for general relief.

The defendants answered the bill admitting, that the trust-fund came into the hands of their testator as executor of Mrs. Leech in the manner stated in the bill; and averring that said fund had been invested in United States bonds of the issue known as "ten-forties," and said bonds were deposited in the Wheeling Savings Institution, a bank of good repute and financial standing, and that they had been feloniously abstracted therefrom by A. C. Quarrier, the treasurer of said bank, without the knowledge or authority of said Hughes, and wholly lost without the fault of said Hughes, and in such manner as to relieve his estate from any liability therefor. The defendants also plead the statute of limitations and claim, that the laches of the plaintiffs in the assertion of their alleged demand have been such as to forbid any relief in this case.

The cause was finally heard on June 2, 1888, on the depositions filed, the report of a commissioner and the exceptions thereto; and the court held and decreed, that the estate of Thomas Hughes, deceased, was chargeable with the principal sum of \$4,500.00 and \$316.57 accrued and unpaid interest thereon and appointed James P. Rogers, trustee, to collect and administer said sums according to the will of the said Mary C. Leech. The defendants obtained this appeal.

The important inquiry is: Are the facts and circumstances appearing in this cause of such a character as to relieve the trustee, Thomas Hughes, and his estate from lia-

bility for the loss of said trust-fund? The record shows, that said Hughes prior to July, 1869, deposited the whole trust-fund, \$4,807.76, to his credit as executor in the Wheeling Savings Institution, a bank of good credit and reputation in the city of Wheeling, of which A. C. Quarrier, a man of good reputation and business qualifications, was then the treasurer or cashier. On July 10, 1869, the executor drew his check in these words: "Pay to ——— 10-40 bonds, \$4,500.00, or bearer, forty eight hundred and seven 76-100 dollars,"—and passed it to said A. C. Quarrier, who in his deposition says: "To the best of my recollection Mr. Hughes informed me, that he wished to purchase as executor forty five hundred dollars in United States ten-forty bonds and desired me to procure them for him. I thereupon agreed to sell him the bonds at the then existing market-price, and I did then and there deliver to him a bill of sale for said bonds, and received from him in payment thereof his check for \$4,807.76, it being understood by Mr. Hughes at the time, that the bonds were in New York city to the credit of the Wheeling Savings Institution."

Quarrier further says, that this transaction occurred at the banking-house of said savings institution, and that the said bonds were to remain under the control of said savings institution subject to the order of Mr. Hughes as executor; that Mr. Hughes never until after the failure of said bank asked for or received any such bonds from said bank; that on one occasion the interest was paid to Mr. Hughes in coupons of ten-forty bonds; and whether the witness detached them from bonds then in the bank or he bought them, he does not remember, and on all other occasions the said bank paid to him the value of the interest-coupons in money. This witness further says, that the probabilities are, that he did not have the bonds in the bank, as he was awaiting Mr. Hughes's demand for them to give the order to purchase them in New York, it being understood that they were to be held subject to his demand or order; but no demand was ever made for them, nor was Mr. Hughes ever informed that the bonds had been purchased.

After the failure of the said bank its books showed, that under date of July 10, 1869, the sum of \$4,874.76 had been

credited to the American Exchange National Bank of New York on account of bonds purchased for said Savings Bank, and on November 2, 1869, the said New York bank is charged with \$4,845.45 on account of 10-40 bonds sold to it by said Savings Bank. Soon after its failure the said Savings Bank made an assignment of all its assets to D. Lamb, trustee, for the benefit of all its creditors without preference. Its indebtedness, principally to depositors, amounted to about \$350,000.00 and its assets realized less than \$100,000.00. It was indebted to Hughes over \$2,000.00 on account of deposits, in addition to his aforesaid claim as executor. Mr. Lamb, the trustee, in April, 1871, issued to Hughes certificates for the amount found by the books of the bank to be due him in his own right, and on March 30, 1872, he issued a certificate to Hughes in these words: "This certifies that upon adjustment there is due to Thomas Hughes forty-eight hundred and forty-five dollars, upon certif. No. 2,556, \$1,000.00 and U. S. ten-forties, misappropriated by treasurer, \$4,845.45, entitled to such dividends as may be made from the assets of the institution." The books of the bank show that certificate No. 2,556, above mentioned, was given to Hughes by Quarrier, cashier, on February 15, 1871, for a deposit of \$3,000.00 with a credit for \$2,000.00 indorsed thereon, leaving \$1,000.00 due on the certificate. This would seem to indicate, that only \$3,545.00 in United States 10-40 bonds had been misappropriated by Quarrier.

These are all the material facts appearing in the record in respect to the management and loss of the said trust-fund; and the question presented is: Do they show such care and diligence on the part of the executor or trustee as to relieve him from liability for its loss?

The law is stated in 2 Lomax, Ex. 482, (293,) as follows: "The result of the best authorities on this subject was thus stated by Lord COTTENHAM: 'Although a personal representative acting strictly within the line of his duty and exercising reasonable care and diligence will not be responsible for the failure or depreciation of the fund, in which any part of the estate may be invested, or for the insolvency or misconduct of any person, who may have possessed it, yet, if that line of duty be not strictly pursued, and any part of the property

be invested by such personal representative in funds or upon securities not authorized or be put within the control of persons, who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may be from any improper motive. * * * Necessity, which includes the regular course of business in administering the property, will in equity exonerate the personal representative. But if without such necessity he be instrumental in giving to the person failing possession of any part of the property, he will be liable, although the person possessing it be a co-executor or a co-administrator.'” *Clough v. Bond*, 3 Mylne & C. 496 ; *Langford v. Gascoyne*, 11 Ves. 333 ; *Salway v. Salway*, 11 Eng. Ch. 215 ; *Challam v. Shippam*, 30 Eng. Ch. 555 ; 2 Williams, Ex'rs, 1648.

In the opinion of the court in *Elliott v. Carter*, Judge LEE after reviewing a number of cases says : “Many other cases and opinions of learned judges might be cited tending to the same conclusions ; and the fair result of the views which they present and the reasoning they adopt is that, where a trustee has acted in good faith in the exercise of a fair discretion, and in the same manner in which he would probably have acted if the subject had been his own property, and not held in trust, he ought not to be held responsible for any losses accruing in the management of the trust-funds.” 9 Gratt. 559. And then after adverting to the fact, that in Virginia executors and other trustees are allowed compensation, which is not the case in England, and expressing the opinion, that this fact ought not to make the rule more stringent as to the measure of their responsibilities the same judge on page 560 says : “As at present advised therefore I should not feel disposed to extend the responsibilities of trustees beyond the limits by which they would seem to be bounded in the cases to which I have referred ; and where they have intended to discharge their duties fairly, I think they should be treated with tenderness, and due caution taken not to hold them liable upon slight or uncertain grounds, lest, by a different policy, men of integrity, and who

would be actuated by the proper views, may be deterred from taking upon themselves an office so necessary to the concerns of life from fear of the anxiety, trouble, and risk which it involves."

It is plainly shown by these views of Judge LEE and other Virginia decisions, that the degree of responsibility of trustees has never been supposed to be any less rigid in Virginia, than it is in England. There are however some Virginia cases, in which the general rule has been relaxed: but they involve the acts of trustees during the late civil war. These cases are anomalous and exceptional and are not to be considered as qualifying the settled law in cases not peculiar in their nature. 2 Minor, Inst. (2d Ed.) 219; *Meyers v. Zetelle*, 21 Gratt. 733; *Davis v. Harman*, Id. 194. The case at bar involves nothing eccentric or unusual either in the condition of the country or the terms of the trust. In all the essentials it is very similar to the cases of *Matthews v. Brise*, 6 Beav. 239, and *Rowland v. Witherden*, 3 Mac. & G. 568. In the former it was decided, that, where a trustee had properly invested trust-funds in exchequer bills and then left them in the hands of his broker, by whom they were misappropriated, the trustee was personally responsible. The syllabus in the latter case is as follows:

"Trustees of stock sold it out and committed the proceeds to their solicitor for investment, by whom it was misapplied and lost. Held, that the trustees were liable for a breach of trust, and that the *cestuis que trust* were entitled to relief against both the trustees and the solicitor, and that they might sue either the trustees alone, or the trustees jointly with the solicitor."

The Lord Chancellor in that case says: "The trustees were bound to satisfy themselves in some other way than by the mere assurances of their solicitor, and by the payments made by him as for interest, that the money was really advanced on mortgage. But they did not even require a sight of the mortgage-deed." In both of these cases the fund was properly placed in the hands of a third party, but because the trustees failed to see, that such third party had done his duty by actually making the investment, the trustee was made responsible.

So in the case at bar, if we concede, that Quarrier had the bonds on hand at the time he agreed to sell them to Hughes, that would not relieve Hughes from responsibility, because it was his duty to see, that the title and possession of the bonds had vested in him, or at least that he had acquired the title, and that they had been placed on special deposit in the bank in his name and as his bonds, so that neither Quarrier nor the bank could convert or misapply them without committing a felony. But Hughes wholly failed to do this. He simply paid for the bonds and subsequently collected the interest on them without ever once even inquiring, whether the bonds had been in fact purchased, or whether they had been deposited in the bank as his property. Instead of discharging this plain duty he left the whole matter to Quarrier and trusted to his assurances. There was no necessity for this. The most ordinary prudence would have required the trustee to see, that the investment had been actually made, and that the bonds were in fact in the bank as his property. But it seems, that Quarrier never even represented or gave Hughes any assurance, that the bonds were in the savings institution. All that appears is, that Quarrier agreed to sell to him bonds, which were then alleged to be in New York city. It is true, the record shows, that on the day Hughes paid for the bonds, the savings bank purchased bonds in New York, but there is nothing to show, that this purchase was for Hughes. But it is also shown, that these bonds were on November 2, 1869, sold in New York on the private account of Quarrier. Be this as it may, there is a still more significant fact in the record, which tends strongly to show, that Hughes must have known, that the whole trust-fund had not been invested in United States bonds. The certificate given to him by Lamb, trustee for the trust-fund, dated March 30, 1872, shows on its face, that only a part of said fund—that is, \$3,845.45—was represented to be for bonds misappropriated by Quarrier; the other \$1,000.00 being, as shown by said certificate, for a balance on a certificate of deposit dated February 15, 1871, held by Hughes in his own right. This latter certificate was for \$3,000.00 with a credit thereon for \$2,000.00 leaving the said balance of \$1,000.00, which was included in Lamb's certificate as part of the trust-

fund. It thus distinctly appears, that the whole of the trust-fund was not in United States bonds at the time the bank failed, and that Hughes must have been cognizant of the fact. While I am not all disposed to affirm, that there was any bad faith or intentional misconduct on the part of Hughes, I can not under all the facts and circumstances of this case and the principles of law before stated discover any ground, upon which he can be relieved from responsibility for the loss of said trust-fund.

The grounds, upon which the responsibility of Hughes has been placed, render it unnecessary to say much in regard to the refusal of the Circuit Court to allow the defendants to re-take the deposition of A. C. Quarrier. The only new fact, which, the defendants claim, they could prove by Quarrier, is, that, at the time he agreed to sell United States bonds to Hughes, the said bonds were in the custody of the Wheeling Savings Institution. It is not pretended, that he would testify, that any bonds were ever delivered to Hughes, or that they had been selected and deposited in the bank for safe-keeping as the property of Hughes. The fact, that they may have been in the bank as the property of the bank or of Quarrier, would not relieve Hughes from responsibility in view of the other fact appearing in the record. The *gravamen* of Hughes's default and the ground, on which he is made responsible, is his failure to have said bonds placed on special deposit as his property and in his name, so that they could not be controlled or used by any person other than himself without the commission of a felony, or at least of something more wrongful than a mere breach of trust and confidence.

It is however insisted for the appellants, that the claim of the plaintiffs is barred by the statute of limitations. On April 4, 1873, Hughes wrote a letter to the plaintiff, Mary Key, addressed to Baltimore, where she resided, in which he stated, that he had invested the trust-fund in United States bonds, and deposited the same in the Wheeling Savings Institution for safe-keeping, and that they had been lost by the failure of the bank in such a manner as to make that bank liable for them; that he had waited to see, what would be realized from the assets of the bank, and had already received two dividends on the said fund, amounting to

\$518.46; that there would likely be other dividends on said fund, and he would probably realize something from other securities, which he had obtained from the treasurer of said bank, but how much he could not tell, and that he would inform her of results. It is contended, that this letter was such a repudiation of the trust, as would start the running of the statute of limitations in favor of Hughes, the trustee. It is admitted that in a case of this character, where the relation of the parties is that of trustee and *cestui que trust*, the statute of limitations will not commence to run, until there has been an open denial and repudiation of the trust by the trustee brought home to the *cestui que trust* in such a manner, as will require the latter to act as upon an asserted adverse title. Ang. Lim. § 166; *Cooley v. Porter*, 22 W. Va. 120; *Decouche v. Savetier*, 3 Johns. Ch'y 190. According to these authorities, it seems to me very clear, that this letter was plainly insufficient to inform Mrs. Key, that Hughes intended to repudiate his trust-relation.

It is further contended, that the laches of the plaintiffs has barred their right to relief in this cause. The record shows, that Hughes continued to pay to the life-tenant the interest upon the trust-fund or an amount nearly or quite equal to such interest up to the time of his death, which did not occur until March, 1886, a few months before this suit was commenced. It is true, there was a difference in the form of the receipts, which he took from Mrs. Key for the payments made prior to 1873, and those he took for payments made thereafter. In the former he is mentioned as "Thomas Hughes, trustee," and in the latter as "Thomas Hughes" simply. But whether the payment was made in the one form or the other, it was a payment in fact and a satisfaction of the only claim, which Mrs. Key had against him. There was no default in the payment, and consequently she had no cause of action, unless she had notice of repudiation of the trust by him. The only pretence of such notice is the letter of April 4, 1873, which we have already considered and hold insufficient for any such purpose. The fact, that the receipts did not describe him as trustee or state, that the payment was on account of interest, did not in the face of the actual payment of the interest even tend to prove a denial of the

trust. The laches, if there is any involved in this cause, is on the part of Hughes himself in failing to legally notify his *cestuis qui trust* of his repudiation of the trust. Until he did that, or refused to pay the interest on the trust-fund, neither the life-tenant, Mrs. Key, nor the remainder-men, her children, had any cause of action. So far as this record discloses, there is not sufficient evidence to warrant any positive statement, that Mr. Hughes ever intended to repudiate this trust, or refuse to pay or account for this trust-fund. But whatever may have been his undisclosed intention, it is certain he never gave the plaintiffs any legal notice of it; and therefore they are not chargeable with laches for not intuitively discovering it. As soon as the appellants, as the executors of Hughes, notified the plaintiffs of their repudiation of the trust, and refused to pay the interest thereon, the plaintiffs promptly brought this suit. It is therefore apparent, that the doctrine of the laches has no application in this suit.

The appellees have made a counter-assignment of error. They claim, that, because the answer of the defendants denies the allegations of the bill, that the payments made by Hughes to Mrs. Key after the loss of the United States bonds were paid as interest on the trust-fund, said payments must be treated as mere gratuities or gifts, and as such it was improper to allow the defendants credit for them, as was done by the decree of the Circuit Court. From the views, we have taken of facts in this cause in the preceding portions of this opinion, it is clear, that this claim of the appellees can not be sustained. We have treated all the payments made by the trustee, Hughes, to Mrs. Key both before and after the alleged loss of the trust-fund, as payments on account of the interest on said fund.

For the reasons hereinbefore stated I am of opinion, that the decree of the Circuit Court should be affirmed.

AFFIRMED.

CHARLESTON.

WEST v. SHAW'S ADM'R.

Submitted January 19, 1889.—Decided February 16, 1889.

BILL OF REVIEW—VENDOR AND VENDEE—PURCHASE-MONEY—TITLE.

A sale is made under a deed of trust of a tract of land situated in Barbour county containing sixteen acres. S. bids in the property, but H., the *cestui que trust*, contends that it was bid in by S. at his (H.'s) request, and paid for with his money. S. transferred his equity acquired by his bid to different parties for valuable consideration but with the express understanding and agreement, that S. should obtain possession of said land and hold it against H. The equity aforesaid being transferred to W., he sued S. for a deed, and S. sued him for the purchase-money. The cases were heard together, and a decree was rendered that W. pay to S. \$200.00, the purchase-money for said equity, with interest from April 15, 1856; and that S. before receiving the same should procure the legal title to said sixteen acres. H. then brought a suit to establish his title to said sixteen acres, in which he succeeded, said three cases being heard together. S. then waived his right to proceed against the land, but the court allowed him to sue out execution against the property of W. W. then filed a bill, reciting what had been done in the three cases, praying that S. be prevented from enforcing said execution, that the papers in said cases might be looked into, and that general relief might be granted him. **HELD:**

I. The bill filed by W. under all the circumstances will be treated and considered as a bill of review. (p. 199 *et seq.*)

II. The title of S. to the sixteen acres of land in the bill mentioned having proved worthless, it would be inequitable and unjust to enforce a decree against W., his vendee, for the purchase-money. (p. 199 *et seq.*)

III. A decree in favor of S., awarding execution upon a decree against W., which was conditioned upon his (S.'s) obtaining and holding the legal title of a tract of land, will be set aside, when a court of competent jurisdiction has decided the said legal title not to be in S. but in some other person. (p. 199 *et seq.*)

J. Bassel and *E. Maxwell* for appellant.

F. Woods for appellee.

ENGLISH, JUDGE:

On the 28th day of December, 1845, Thomas Hoffman ex-

ecuted a deed of trust upon thirty six acres of land, which had been conveyed to him on the same day by William Powell and others, situated in Taylor county, then Virginia now West Virginia, to secure to William Powell the payment of \$238.00. In this deed of trust one Charles W. Newlon was the trustee, and, default having been made in the payment of the money secured by said trust-deed some time in the year 1848, sixteen acres of said tract of land were sold by said trustee at public auction under said trust, at which sale said land was bid in by one William Shaw for the sum of \$106.00. It appears from the record, that Thomas Hoffman from and after the time of said sale claimed, that said William Shaw purchased said sixteen acres of land at his request, and that he paid part of the money to the trustee himself and furnished the residue of the money to said Shaw to enable him to pay for the same.

On the 21st day of November, 1853, an agreement in writing was entered into between said Shaw and one William Powell, whereby said Shaw contracted to sell to said Powell said sixteen acres of land; and in said agreement it was expressly stipulated, that, in case the said Shaw should obtain possession of said land and be able to hold the same against the claim of said Hoffman, said Shaw should convey it by deed of special warranty with relinquishment of dower unto said Powell on or before the 15th of April, 1856. In consideration whereof the said Powell agreed to pay said Shaw the sum of \$200.00 at the time of the delivery of such deed. At the date of this agreement said Hoffman seems to have been in possession of said land by his tenant, the said William Powell, who on the same day took a lease from said Shaw for two years commencing on the 15th day of April, 1854, for said tract of land; and on the face of said lease it is stipulated between the said Powell and the said Shaw, that the said Shaw should in no event be held responsible for the sum of \$25.00, the cash rent paid for said term, whether the said Powell should be able to obtain or retain possession of said land for or during said term or not. A short time afterwards said West sold said land to said Powell in consideration of \$200.00 and transferred the same to William H. Shields who in turn transferred it to one Thomas Newlon;

but no purchase-money seems to have been paid upon any of these transfers.

Out of these proceedings four suits originated, all of which are so intimately connected, that they were eventually heard together. In the first place, in 1856, said Thomas M. West brought a suit against said Shaw to obtain a deed in pursuance of the contract of November 21, 1853. Said Shaw then sued said West for the purchase-money. In 1865 these two suits were brought on and heard together, and a decree was rendered on the 25th day of November in that year in said consolidated cases directing said Thomas M. West to pay to the complainant, William Shaw, the sum of \$200.00 with interest thereon from the 15th day of April, 1856, until paid and costs; and said decree further provided, that the said William Shaw before receiving the same should procure from the defendant, Charles W. Newlon, trustee as aforesaid, the legal title to the land in the said bills and proceedings mentioned and should execute and acknowledge for record a deed with covenants of special warranty with his wife's relinquishment of dower therein conveying to the said Thomas M. West the said tract of land and file the same in the papers of the cause. In 1866 said Thomas A. Hoffman brought a chancery suit against said Thomas M. West, William Shaw, William Powell, William H. Shields, Thomas Newlon and Charles W. Newlon, reciting the proceedings, which had been taken in the two first-named cases, and praying that the decree obtained in the cause of Thomas M. West against William Shaw and William Shaw against William Powell might be set aside and be rendered of no effect, and that a decree might be entered compelling the said Charles W. Newlon, trustee as aforesaid, by deed to reconvey said land to plaintiff, and that all conveyances, leases and shifts between the said parties relative to said land be annulled and cancelled.

On the 21st day of September, 1868, the three cases of *Thomas M. West v. William Shaw et al.*, *William Shaw v. William Powell et al.*, *Thomas Hoffman v. William Shaw et al.* were consolidated and heard together; and a decree was therein rendered, in which it was held, that said Hoffman in the last-named suit was entitled to the legal title to the land

named in said causes; and, said title having been conveyed to and then being in said Thomas M. West, it was decreed that said West do by deed with covenant of special warranty convey said land to said Thomas A. Hoffman, and upon his failure to do so in ten days directing a special commissioner therein named to convey the same to said West; and the said William Shaw by his counsel in court waived the right to obtain satisfaction of the amount decreed to be paid by him by the decree rendered in the case of *Shaw v. West et al.* on the 25th day of November, 1865, by resorting to the sale of said land therein decreed to be sold for that purpose,—a waiver and concession, which, it occurs to me, could be very easily and cheaply made by said Shaw, for the reason that the land, which had been decreed to be sold as the property of West did not really belong to said West, but belonged to the plaintiff, Thomas A. Hoffman, and said decree had just directed the legal title to said land to be conferred on Hoffman. Said decree proceeds however: and on motion of said Shaw he has leave to sue out against said Thomas M. West such writ or writs of *feri facias* as might be necessary to obtain satisfaction of the amount decreed to be paid by said West to said William Shaw by said decree rendered on the 25th day of November, 1865, together with the costs of suing out said executions.

In October, 1869, the said Thomas M. West filed a bill in said court against the administrator of said William Shaw and others, in which he recites a history of the transactions between these parties with reference to said land, setting out briefly, what had been done in said former suits, and the fact, that Hoffman had been decreed to have the best claim to the legal title to said land, and that he had conveyed the same to him in obedience to the direction of said former decree, and claiming, that, as the title of said Shaw to said land had been set aside on the ground of legal, if not actual, fraud, he should release his decree against said West, but that, instead of discontinuing his decree and claim for purchase-money, after his title to said land proved to be worthless, he had sued out a writ of *feri facias* on his decree and had the same levied on the cattle and other property of plaintiff and will make the money, if not restrained by the order of a

court of equity. He prays, that the papers and decrees in the three suits thereinbefore mentioned and described be made and taken as proof in and part of his bill; that the collection of said execution may be restrained and enjoined; that, when the whole matter can be heard, said Shaw may be perpetually enjoined; and, when the whole matter can be heard, that he may have general relief *etc.*

Can this bill filed by said Thomas M. West be regarded and treated as a bill of review? "The causes for which a bill of review may be maintained are limited to these. (1) There must be error in law apparent upon the face of the decree; or (2) the party seeking to review the decree must allege and prove the discovery of new matter which could not have been used at the time of making the decree in consequence of the party's ignorance that such matter existed." Sands suit in Eq. § 631. This bill, if a bill of review at all, is based upon error in law apparent upon the face of the decrees; and in 4 Minor Inst. § 1253, it is stated that "no previous leave of the court is requisite in order to file a bill of review for error of law apparent on the face of the proceedings."

When we examine the bill, we find, that, although it does not state concisely the errors of law relied upon, it does in general terms call attention to the errors of law apparent on the face of the record. In the first place it calls attention to the fact, that as a condition precedent to the right of recovery of the \$200.00 purchase-money from Powell, under whom appellant took as assignee, said land was to be paid for, when said Shaw should make a deed for the same; and that there was a further condition, that the sale should become valid, only if he (said Shaw) could hold the land against the claim of said Hoffman. Said bill recites the proceedings had in the chancery suit of appellant against said Shaw and others and also in the suit of Shaw against appellant and others; that these cases were heard together; and that the court decreed, that said Shaw should convey said sixteen acres of land to appellant, and that appellant should pay \$200.00, the purchase-money, and interest from the 15th day of April, 1856, till paid and costs, and that said land should be sold, if the purchase-money was not paid. The plaintiff states, that this

decree was satisfactory, as he supposed the title of Shaw was settled and good. He then states, that Hoffman brought his suit against Shaw and others, which resulted in determining, that said Shaw never had any equitable right to said land, but the purchase was made for and with the money of Hoffman, and that neither Shaw nor appellant could hold the same against the better claim of said Hoffman, and that appellant was directed to pass the legal title, which he had obtained under the decree in his suit against Shaw to said Hoffman, which decree he complied with by conveying said title. This statement shows an utter failure of consideration, and appellant claims in his said bill, that said Shaw's decree against him should be released, as his title was set aside on the ground of legal, if not actual, fraud; but, instead of discontinuing his decree and claim for purchase-money, he has sued out a writ of *feri facias*, and levied it upon plaintiff's personal property. He then prays, that the papers and decrees in the three suits thereinbefore described and on file among the papers of the court be considered as part of his bill; that when the whole matter can be heard said Shaw be perpetually enjoined from collecting the execution aforesaid, and for general relief.

Now, if this prayer be allowed, it would result in reversing and annulling the only portion of said decrees, that appellant cared to complain of, and the only part of the decree, that was affecting his interests and said prayer is in effect the same, as if he had prayed, that said decree be reviewed and reversed, so far as it directed said judgment to be enforced against him, after the consideration proved worthless.

In the case of *Sturm v. Fleming*, 22 W. Va. 404, it is held: "In chancery pleadings, it is the disposition and practice of courts of equity to regard substance rather than mere form or name, and to so mould and treat the pleadings as to attain the real justice of the case; consequently a complaint styled by the pleader a 'petition,' which has all the elements of a bill in the nature of a bill of review, will be treated as such, if it has the necessary parties with sufficient averments and prayer for relief."

In the case of *Goolsby v. St. John*, 25 Gratt. 163, in which there was a decree perpetuating an injunction, setting aside

a judgment and remanding the case to rules, St. John filed a bill of review for errors apparent in the decree, and the court made a decree in the bill of review case, reversing and annulling said decree, and directing the case to stand upon the docket, as it did before said decree; and on the same day the original case of Goolsby & Rector against St. John was reinstated on the docket, and on motion of St. John it was decreed, that the injunction be dissolved. The appellate court held (1) that it was a proper case for a bill of review; (2) that the court should not only have dissolved the injunction, but should have dismissed the bill; (3) that the bill of review was a continuation of the original suit, and there should not have been two decrees, but the whole should have embraced in one decree, and the appellate court will so regard them; (4) that, if the case had not been a proper one for bill of review, still an appeal from that decree brings up the whole case, and the appellate court will go back to the first error and reverse the decree complained of.

In the case of *Middleton v. Selby*, 19 W. Va. 168, third point of syllabus, it is held: "In determining what is error of law apparent on the face of the decree, the court can not look into the evidence in order to see if the decree is erroneous, as that is the proper office of the court upon appeal; but in determining this question it is necessary to look at the whole record, including the testimony, to ascertain whether upon the whole case error of law has been committed."

In the case of *Martin v. Smith*, 25 W. Va. 579, a bill of review was treated and considered as a petition for a rehearing, and the decrees complained of were reviewed. In that case (page 583) SNYDER, J. in delivering the opinion of the court says: "In many other cases in this State and in Virginia, it has been held that a literal compliance with form is not required by courts of equity. They regard substance rather than mere form, and so mould and treat pleadings as to attain the justice of the case. Under this rule, a petition for a rehearing has been treated as a bill of review, when the facts made it necessary to so regard it, and a notice to correct a decree on a bill taken for confessed has been treated as a petition for a rehearing;" citing numerous authorities.

So in the case under consideration I must conclude, that the bill filed by appellant in the Circuit Court of Taylor county, although praying an injunction, must be considered and treated as a bill of review; and it will be seen, that the Code, c. 133, s. 5, provides, that a court or judge allowing a bill of review may award an injunction to the decree to be reviewed.

In this case I am of opinion, that this Court would be fully warranted in holding and treating the last bill filed by appellant as a bill of review; and treating it thus there can be no question as to the error existing in the decree of September 21, 1868, awarding execution against the property of appellant on a decree, which had been obtained upon a claim, which had proved utterly worthless, and instead of issuing execution upon said decree the court should have cancelled and annulled the same. Treating then the bill filed by appellant not as an injunction-bill but as a bill of review, the decree rendered therein by the Circuit Court of Taylor county on the 31st day of March, 1888, must be reversed and annulled; and the decree directing appellant to pay the said William Shaw the sum of \$200.00 with interest thereon from April, 1856 and costs being dependent upon said Shaw's obtaining the legal title to the sixteen acres of land in the bill mentioned, and he having failed to obtain said legal title, said decree and the decree of September 21, 1868, awarding execution on said former decree are reversed, so far as they give said decree for \$200.00 and interest and costs and award execution upon the same; and the appellant must recover from the estate of said William Shaw the costs of this appeal.

SNYDER, PRESIDENT, and GREEN and BRANNON, JUDGES, concurred.

REVERSED IN PART.

CHARLESTON.

BANK v. ATKINSON.

*(GREEN, JUDGE, Absent.)

Submitted January 18, 1889.—Decided February 16, 1889.

1. HUSBAND AND WIFE—SEPARATE ESTATE.

A husband with the knowledge and consent of his wife at different times receives, or she delivers to him, the proceeds of the sale of her realty, gives her no note or written obligation to repay it, mingles it with his means, uses it in his business for years, keeps no written account of such moneys, nor does she, then becomes insolvent and some eight or ten years after his receipt of the money purchases real estate in the name of his wife; and it is alleged by him and her, that it was paid for with the money so received; and several years afterwards he and she unite in a deed of trust to secure a very considerable debt on said real estate, such debt being a loan to the husband; and before such purchase a judgment is rendered against him for a debt. The lot is liable to the judgment. (p. 205 *et seq.*)

2. HUSBAND AND WIFE—SEPARATE ESTATE—STATUTE OF LIMITATIONS.

If, when such purchase is made, any claim, which she may have on him for such proceeds of her real estate, is barred by limitation, that circumstance tends strongly to repel the wife's claim to exempt the land against creditors. (p. 205 *et seq.*)

3. HUSBAND AND WIFE—PRESUMPTION OF LAW—EVIDENCE.

The law will not from the mere delivery by the wife of her money to the husband or from the permitted receipt by him of her separate estate imply a promise by him to repay her, but will require more,—either an express promise, or circumstances to prove that in such matters they dealt with each other as debtor and creditor. To thus raise a debt against him to the prejudice of creditors, the proof must be clear, full and above suspicion. (p. 205 *et seq.*)

4. Points 1, 2, 3, and 5 of the syllabus in *Burt v. Timmons*, 29 W. Va. 441 (28 E. Rep. 780,) re-affirmed. (p. 213.)

J. F. Brown for appellant.

W. J. W. Cowden for appellees.

BRANNON, JUDGE:

On the 20th of November, 1874, the Kanawha Valley Bank

*On account of illness.

38	208
38	458
38	308
38	208
34	455
32	208
36	17
32	203
37	401
32	203
38	754
32	203
41	260
41	892
32	203
49	636
32	203
47	694
47	697
47	698
47	720
32	203
49	294
32	203
54	447
32	203
56	347
57	487
32	203
66	678

recovered a judgment in the Circuit Court of Kanawha county against Charles T. Duling, Herman L. Gebhart, and George W. Atkinson, for \$861.92, and on the 31st of March, 1885, it brought a suit in equity in the Circuit Court of Ohio county against Ellen Atkinson and others, alleging in its bill the recovery of this judgment and its non-payment, and that on the 2d of January, 1882, the United States Building, Land & Loan Association of Wheeling conveyed to Ellen Atkinson a lot of land on Twelfth street in the city of Wheeling for the consideration of \$3,300.00 and that said consideration was paid by George W. Atkinson, her husband out of his own funds; that he purchased it from the association, and that Ellen Atkinson paid no part of it, and that George W. Atkinson was largely indebted at the time and used the name of his wife and had the lot conveyed to her, to delay, hinder and defraud his creditors; that said Atkinson, on January 17, 1885, borrowed from the Commercial Bank \$1,500.00 and secured it by a deed of trust on said lot executed by his wife and himself; and alleged that he was insolvent. The bill prayed that said lot be decreed to sale for said debt of plaintiff, and that the deed to Mrs. A. be held void as to said bank.

Ellen Atkinson answered admitting the debt of plaintiff, her husband's insolvency and the deed of trust to the Commercial Bank for money borrowed by her husband, but denying that the consideration of the conveyance to her of said lot was paid by her husband, or that he purchased, or that he used her name in the conveyance to defraud his creditors, or that she never paid any consideration deemed valuable for the lot. She averred, that she married on 8th December, 1868, and when she married she and her sister owned a lot in Charleston vested in a brother as trustee, and, she having bought her sister's share, it was conveyed to her 21st March, 1870; that on the 8th February, 1871, Bessie Eagan, her sister, purchased a lot in Charleston, and on 10th March, 1871, she, Ellen Atkinson, and Bessie Eagan traded properties, and said Ellen received in the exchange a property in Charleston called the "Moore Property;" that on 1st of November, 1872, she, her husband joining in the deed, conveyed to Smith and Gilligan a portion of said lot for \$4,000.00

and on 15th August, 1874, conveyed the balance to A. C. Fellars for \$500.00; that, with part of the money received from said two pieces of property she purchased from the Methodist Episcopal Church the parsonage-property in Charleston, paying for it \$2,000.00 cash; this last-mentioned property on February 1, 1883, she and her husband conveyed to J. D. Pubbs for \$1,500.00; that it was from these transactions with the money she received from the sales of her separate estate the purchase-money was paid to the said association for said lot in Wheeling. She denied all allegations of fraud.

George W. Atkinson answered admitting the indebtedness and his inability to pay his debts. He alleged, that it was not true, that the consideration for the Wheeling property was paid by him, or that he used the name of his wife in its purchase to defraud his creditors, and averred, that the consideration for the property was paid wholly with money belonging to his wife; that when he married her she owned real estate in Charleston, which was exchanged for other real estate, from the sale of which \$4,750.00 was realized; and said Wheeling property paid for out of it. He admitted, that the deed of trust to the Commercial Bank was for a loan to him. Depositions were taken. On the hearing plaintiff's bill was dismissed, and it appealed here.

It is clear from the evidence of George W. Atkinson and Mrs. Atkinson, that the proceeds of the sale of her Moore property went into his hands and with her knowledge; that he gave her no note for it nor any memorandum touching it. She declined to receive a note for it, as he definitely states. No written account of moneys proceeding from her property, though there were several transactions, or of rents arising from it was kept by either of them. He made no deposit in bank or elsewhere to her credit, or to himself as her trustee or agent in any manner designating it as a special fund distinct from his own money. Other moneys he certainly had during the years covered by the transactions pertinent to this case, for he was holding lucrative offices under the United States government,—post-master at Charleston, collector of internal revenue, and United States marshal,—and he had a bank account, as he speaks

of drawing checks on bank. Moreover it cannot be said, that the money arising from the sale of her property or its rents went to acquire the Wheeling property rather than any of his own proper money derived from other sources, for he mingled it with his and used it for years in his business. His own deposition shows this.

He said: "The \$3,300.00 was paid by me as agent for my wife out of her funds, which I held in trust for her." When asked how long he had held in trust funds of his wife, he answered: "From the time it came to my hands from the sale of the Charleston property until it was paid over for the Wheeling property." Being asked as to the character of the trust, he answered: "It was a positive understanding between us that the money was hers; that it should not be taken from her but be forthcoming, when her needs required it. I offered to give her notes, but she declined to receive them, for the reason that she knew, that I would not defraud her out of it, and the further reason that neither of us considered it necessary, in a legal point of view, to pass notes between us." He further said: "It was a verbal contract. It was at various times, and, as I have stated above, no notes were given. The only evidence of the contract was the verbal acceptance of it. It was a verbal contract between man and wife, which should be held sacred, and I have ever regarded it such." Asked to state definitely the time, when he received \$4,750.00 which he admitted having received from her property, he answered: "I can not. I have no means of arriving at the exact date." When asked to state, what he did with the money immediately on its receipt, he says: "I can not for the life of me answer that question." He stated also, that the money was received at different times, and he could not say definitely the disposition he made of the money at the time; and that \$2,000.00 of it was paid on the Methodist Episcopal Church lot in Charleston, and some of it was on the purchase of the lot in Wheeling.

He was asked to state, outside of the \$2,000.00 paid the Methodist Episcopal Church, what disposition was made of any part of the \$4,750.00, where it was, or how it was used up to the time of the purchase of the Wheeling lot, and he replied: "I can not definitely furnish you the desired in-

formation. I held it in my possession and may have used it temporarily in some of my business undertakings, but it was always understood, that it should be forthcoming or its equivalent, when needed by my wife." He further stated that he held the money in trust and paid the same to her creditors, "out of my own resources," either growing out of the funds I held for her, and may have used in my own affairs, or out of my earnings in my business undertakings." He was asked: "Can you not state more definitely the immediate sources from which you got the money you paid for the property on Twelfth street, in Wheeling?" He answered: "I cannot." He further stated: "It may be that I borrowed temporarily from A. F. Gibbons funds to help make up a sufficient sum to pay one or more of the notes of my wife due for the purchase-money of the property mentioned in the bill. I have stated over and over again that I had received from my wife in trust for her, and as her agent, a sum or sums of money greater than the amount paid by her in the purchase of the property mentioned in the bill, and that the money so received from her was held by me in trust for her, and frequently used by me in my personal transactions, but when the money was required by her it was always forthcoming."

He was asked, "Was the money held by you in trust for your wife so held or placed, that you could distinguish it from your own money?" and answered, "It was not in the general handling of it, but at all times I kept a careful account of the same, so that I could at any time answer the question as to how much of her funds I had in my possession." When asked when and how the account was kept, and where it was then, he answered: "The transactions involved only real estate, and, when a piece of property was sold, the amount of course was known to both. It was therefore a very easy matter to keep track of the amounts without keeping a written record. I do not remember whether either of us ever made any entry of these transactions in writing. There never was a time, however, when it was not known to both of us the exact amount I held for her." He then stated he owed her a balance of \$350.00 exclusive of interest.

He was then asked to state the receipts and disbursements, and replied: "I received \$4,750.00 from the sale of the Capitol-Street property. I paid \$2,000.00 for the Methodist Episcopal Church parsonage. This left a balance in my hands to her credit of \$2,750.00. I received from the sale of the parsonage property \$1,500.00. This would make \$4,250.00 of her money which I held in trust. I paid for her on the property mentioned in the bill \$3,300.00. This would leave a balance due her of \$950.00. Deducting from this the amount paid by her on the Mountain Lake property, \$500.00, would leave a balance to her credit of \$450.00. You will see from my last answer I made a clerical error of \$100.00 when I said \$350.00."

He was then asked if the above moneys constituted all that he held in trust for his wife, and he answered: "I presume it does not, although I can not now think of any sum." His wife stated that he collected rents. He further stated that his wife did not directly exercise direction or control as to any property held in trust for her, but always felt that her funds would be forthcoming "at her call, should I live, without any note or bond, and, if I should die, I carry enough life insurance to make her comfortable." When asked where he got the \$500.00 cash payment on the Wheeling lot he answered: "I can not answer that question, as I do not remember." When asked where he got the money to pay the second \$500.00 payment, he answered: "I can not answer that definitely, as I kept no separate accounts from whom I received funds due me from persons with whom I had business transactions." He made the same answer as to the third \$500.00 payment. When asked by whom a further \$500.00 payment was made, he answered: "My recollection is, I paid it as the agent of my wife." These quotations furnish, substantially, the case as put by the defendant G. W. Atkinson. The defense rested on the evidence of G. W. Atkinson and wife.

It can not be said, that the specific money from her property was paid on the purchase of the Wheeling property. It came from his general funds. He denominates it a "trust." He may honestly so regard it, but to merely denominate it a "trust" does not make it a trust, unless the facts in law make it one. A trust must have a definite, certain subject-matter.

Hill, Trustees, 44. The trust will not be executed, unless the precise nature can be ascertained. It must have a specific, certain object, if express. 1 Perry, Trusts, § 83. Mrs. Atkinson says: "At my own request my husband took charge of my money to keep it for me. I knew he would be a much safer person to have care for it than I. I don't know anything about how it was used. He had it for me. He pledged himself, that, at any time I wanted it to invest in a home, it would be forthcoming. He pledged himself solemnly to that." But viewed in the most favorable light is this anything but a loan from her? A deposit for sake-keeping until called for? He was not charged with selecting and buying a home. No specific instruction of that kind was given him by her, nor any undertaking on his part to do so, even according to her evidence. He was not a trustee to invest the fund. But when the question was propounded to him, "What was the character of the trust, on which you held the money?" his answer was: "It was a positive understanding between us, that the money was hers, that it should not be taken from her, and that it should be forthcoming when her needs required it." He specifies no particular trust of legal outline or certainty with a specific object in view, and he does not say with Mrs. A. that he pledged himself to have the money, when she should want a home. The most that can be said of it is that George W. Atkinson was a mere holder or loanee of this money.

And here it is proper to say, that the contention, that a trust existed, is not set up in either of the answers of George W. and Ellen Atkinson; the position taken by way of defence in them being that the Wheeling property was paid for not by George W. Atkinson but by the proceeds of the sale of her separate estate, and neither answer alleges, that the money therefrom went into the husband's hands by way of trust for any purpose. This defence is first found in the depositions, but the depositions can not be read to support a trust not set up in the answer, for the rule of pleading is that the *allegata et probata* must both exist and correspond, and the *probata* can perform no function unless preceded by *allegata*. Matters not charged in the bill or averred in the answer can not be considered on the hearing. *Hunter's*

Ex'rs v. Hunter, 10 W. Va. 321. Could it be regarded a trust for the purchase with her particular fund of the Wheeling lot, the case would have more strength, especially as to limitation. Can we uphold it as a loan?

Wells, Mar. Wom. § 370, p. 371, on the authority of *Schaffner v. Reuter*, 37 Barb. 49, and *Savage v. O'Neil*, 44 N. Y. 298, says: "As to loans between them, it has been held that where a conveyance made by a husband to a wife is only a fair equivalent for money borrowed of her, and is free from actual fraud, although executed after the debt has been incurred by him, it is supported by the antecedent equitable obligation to pay it, and in legal effect relates back to the time of the loan, so as, of course, to cut out any intervening creditor of the husband. Being equitably bound to pay, he may do so voluntarily, either in money or other property; and, if a creditor undertakes to impeach it, the burden is on him to show *mala fides*; that is, where a loan or the indebtedness of the husband to the wife is *prima facie* established; for, where a wife claims a debt due her, she must, like any other person, show it in some way." And in *French v. Motley*, 63 Me. 326, it is held that other creditors of a husband can not complain if he prefers to discharge a debt to her rather than to them. So in *Bank v. Kimble*, 76 Ind. 195, this position is said to be well settled in that state by several cases. So in *Steadman v. Wilbur*, 7 R. I. 481.

To the general proposition, that, if a clearly valid subsisting debt in favor of a wife against the husband were fully proven, he might pay it directly or indirectly, if he preferred to do so, by paying another for conveying property to her in discharge of said indebtedness, I would accede. But it is to be noted, that under the rule above quoted from Wells, a loan, a distinctive loan, as distinguished from a gift, must be established. In the Rhode Island case, which is as liberal as any towards the wife in this matter, it is held: "The law will not from the mere delivery by her of her money to him or from the permitted receipt by him of her separate income, imply a promise by him to repay her, but will require more,—either an express promise or circumstances to prove, that in such matter they dealt with each other as debtor and creditor." The Chief Justice in delivering

the opinion in that case says: "She cannot, when her husband becomes insolvent, convert into debts, as against his creditors, former deliveries to him of her money or other property, or permitted receipts by him of the income or proceeds of sale of her separate estate, which at the time of such delivery or receipt were intended by her as gifts, to assist him in his business, or to pay their common expenses of living; and, considering the relation between them, the law would not, merely from such delivery or receipt, imply a promise on his part to repay or replace, as in cases not thus related, but would require more, either in express promise or circumstances, to prove that in these matters they had dealt with each other as debtor and creditor." It was so held also in *Edelen v. Edelen*, 11 Md. 415.

It would be exceedingly dangerous to the business world to have a loose principle in this matter, and would open a wide door for the defeat of honest creditors. A husband and wife embark on the voyage of life together, expecting to meet the waves together, devoting to the support of themselves and children and to his success their common efforts and their several means. She is always willing from affection for her husband and interest in his success to extend him the help of her means, his business interests being in a large sense her interests, never expecting any return of the means she commits to his hands; and if, after he has had those means employed in his business for years, mingled indiscriminately with his, it were permitted to her, when misfortune overtakes him, to raise up loans to the prejudice of his creditors and support them by his own and her evidence, after creditors had trusted him in total ignorance of such loans, and he were allowed to use his means in purchasing real estate in her name, a wide road would be opened for the promotion of wrong against honest creditors. Better that there should be individual cases of hardship, than that such dangers should stand in the way of the business world. If any one must suffer, better that even the helpless woman suffer than honest creditors, whose means or property were perhaps consumed in furnishing shelter, food and raiment to the wife and her children.

In this case the husband had had the proceeds of the sale

of the Moore property, except what was invested in the church lot, some of it eight, some nine, some ten years nearly before the purchase of the Wheeling lot, and his wife's right of action for it as a loan had become barred. In *Crawford v. Carper*, 4 W. Va. 56, where a party had given a note to his father-in-law for money and property advanced at different times, for which no notes were taken at the time of the advancement, and of which no account was kept, and judgment was confessed on the note, and such note and judgment were attacked by creditors for fraud and were overthrown, BROWN, President of the court, without passing on the question, whether it was a just debt or not, but waiving that as unnecessary, said: "These debts thus acknowledged, and for which the note was given and judgment confessed, were all barred by the statute of limitations. And while it was all very right, if they were just and real, that they should be paid as between the parties, yet still the important question remains whether, under the circumstances of the case, it could be done so as to intercept the other *bona fide* creditors, whose debts were not so barred. And I am free to say I think it could not, because it comes clearly within the first section of chapter 118, Code of 1860, and is just such a case as it was the intention of the statute to prohibit."

Here the husband mingled the wife's money with his own; no note was ever given by him to her; no account kept; and he used it in his business. He collected some rents from the realty, as his wife says, and no account is kept. This is all right—as between husband and wife, very natural; but it does not answer the rigid requirements of the law, when the wife after her husband's insolvency seeks to set up indebtedness in her favor. And again, the fact, that the wife in 1885 united in a deed of trust conveying the Wheeling property to secure the large sum of \$1,500.00 purely a loan by the bank to her husband, tends to confirm the idea, that it was substantially his property.

A line of decisions in our State made up of many well-considered cases goes far in behalf of creditors against fraudulent conveyances; and there is perhaps no state in the Union, whose decisions go further to vindicate the rights of honest creditors over such conveyances, especially when be-

tween relatives, and more especially between husband and wife.

In *Burt v. Timmons*, 29 W. Va. 441, (2 S. E. Rep. 780) it is held: "A transaction between father and child, husband and wife, brother and sister, or between others between whom there exists a natural and strong motive to provide for a dependent at the expense of honest creditors, if such transaction be impeached as fraudulent, may be shown to be fraudulent by less proof, and the party claiming the benefit of such transaction is held to a fuller and stricter proof of its justice and of the fairness of the transaction, after it is shown to be *prima facie* fraudulent, than would be required if the transaction was between strangers." And that "when a wife purchases land or other property the burden is on her to prove distinctly that she paid for the land or other property with funds not furnished by her husband. Evidence that she purchased amounts to nothing, unless it is accompanied with clear and full proof that she paid for it with funds furnished by some one other than her husband." And the court also held that "a transfer of property, either directly or indirectly, by an insolvent husband to his wife, is justly regarded with suspicion, and unless it clearly appears to have been entirely free from intent to withdraw the property from the husband's creditors, or the presumption of fraud be overcome by satisfactory affirmative proof, it will not be sustained."

Herzog v. Weiler, 24 W. Va. 199; *McMasters v. Edgar*, 22 W. Va. 673; and other cases of same general principle, might be cited. Particularly in *McGinnis v. Curry*, 13 W. Va. 29, where a transaction, by which the proceeds of the sale of the wife's land went into the husband's hands, was held to be a gift by her not a loan, there is a strong leaning towards the position, that, where a wife allows the proceeds of the sale of her separate estate to go into her husband's hands and so remain for years, especially when he uses and invests it in business, it is to be taken, that the parties did not deal as debtor and creditor, that they did not contemplate the creation of debt but a gift rather than a loan.

I may say, that I have struggled hard to sustain this conveyance, but under the facts of the case and the decisions re-

ferred to, considering their letter and spirit I find myself unable to do so. Our decisions are rigid, it must be admitted, but on the whole are right and promotive of the highest good faith (*uberrima fides*) between debtor and creditor, and should not be relaxed.

Reference is made by counsel for plaintiff to the fact, that Mrs. A.'s earnings went to pay her sister for her interest in the home property, which was exchanged by Mrs. A. for the Moore property, and that such earnings were the property of the husband, and that, as the Moore property entered into the purchase of the Wheeling lot, such earnings may be followed up. Such earnings would be the husband's. *Bailey v. Gardner*, 31 W. Va. 94 (5 S. E. Rep. 636). So the ready money, which she owned at marriage, and the furniture, which she sold, which money, furniture and earnings went to acquire the sister's half in the home property, would be the husband's. But on March 21, 1870, the home property was conveyed to Mrs. A., and it does not appear, that the plaintiff's or any debt then existed against the husband, and he could lawfully allow such earnings, furniture and money to be invested for her use; he could give it to her. True, the fact may not be wholly irrelevant, to be considered with the other circumstances in determining whose property is the Wheeling lot, but its weight does not seem to be important.

The decree complained of is to be reversed with costs against Atkinson and wife, and the cause remanded to the Circuit Court of Ohio county with instructions to ascertain the amount of the debt of the Commercial Bank under its deed of trust, which appears to have priority, and enter a decree subjecting the said lot on Twelfth street, Wheeling, to said Commercial Bank's debt and plaintiff's judgment in the bill mentioned, and for further proceedings.

REVERSED. REMANDED.

CHARLESTON.

HESCHT v. CALVERT.

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43	717

*(GREEN, JUDGE, absent.)

Submitted January 21, 1889.—Decided February 25, 1889.

1. GUARDIAN AND WARD—ACCOUNTING—COMPENSATION.

C. is appointed a guardian for A. and G., infant children of J. H., who enlisted in the United States army and was killed in 1862 leaving a widow, who married a widower with eight children in the latter part of the year 1863 and by him became the mother of eight more children. The guardian applied for and obtained a pension for his said wards after considerable delay in November, 1875. In December, 1875, the mother of said wards and her second husband presented a claim to said guardian for keeping, clothing and schooling said wards for eleven years up to December 4, 1875, amounting to \$1,056.00, which was paid by said guardian out of said pension-money as of that date, he taking their receipt for the amount so paid. Said guardian also paid said parties \$105.00 on the 23d day of June, 1877, and \$100.00 on the 6th day of January, 1879, for boarding, schooling and clothing said wards, taking receipts for the amount so paid, but neither receiving nor requiring the production of an itemized account of the claim so presented; and upon a settlement of his accounts before a commissioner on the 20th day of December, 1882, said guardian was charged with \$1,505.53 as received in January, 1876, although really received in December, 1875, and \$30.00 every three months thereafter until February, 1878, making the aggregate amount received \$1,715.53, and credited with \$1,056.00 as of December 4, 1875, \$105.00 as of June 23, 1877, and \$100.00 as of June 6, 1879, and \$10.00 as of December 10, 1877, paid by said guardian to said parties as aforesaid, said commissioner charging said guardian with no interest upon the amounts so received by him. Upon a bill filed to surcharge and falsify said account and the proceeding had therein, *held*, that the claim presented by the mother and step-father of said wards stands on no different footing, from what it would, if presented by a stranger. (p. 228.)

2. GUARDIAN AND WARD—ACCOUNTING—INTEREST.

The money so received by said guardian for said wards should have been invested or loaned within thirty days after it was received, and he should have been charged with interest thereon after that time, unless he should have sooner loaned or invested the same. (p. 232.)

*On account of illness.

3. GUARDIAN AND WARD—ACCOUNTING.

An account of this character against an infant should not only be itemized but should be sustained by satisfactory proof; and a guardian, although duly authorized to disburse the principal of his ward's estate for education and maintenance, should require such proof before paying the same. (p. 231.)

4. GUARDIAN AND WARD—ACCOUNTING—COMPENSATION.

Said guardian having failed to lay before a commissioner of accounts a statement of receipts during the several years he had the money of his said wards in his possession and not accounted for, he should have no compensation for his services during the years he has thus failed to settle his accounts. (p. 231.)

5. GUARDIAN AND WARD—ACCOUNTING.

If the recovery of such claim or any portion of it could be prevented by illegality of consideration or lapse of time or by any other fact within his knowledge, the guardian must avail himself of such defence, or he can obtain no credit for the amount paid. (p. 231.)

6. GUARDIAN AND WARD—ACCOUNTING.

A guardian who has more than one ward should keep their accounts distinctly and settle them separately, showing his receipts and disbursements and the balance in favor of or against each. (p. 228.)

S. B. Hall and *L. N. Tannen*, for appellants.

W. S. Wiley and *R. McEldowney*, for appellees.

ENGLISH, JUDGE:

On the 16th day of July, 1870, one A. G. Calvert was appointed guardian for Albert Marion Hescht and Gracilla Belle Hescht, infants and only children of Jacob Hescht and Mary Ellen, his wife, and entered into bond in the penalty of \$600.00, with one Wilfred Moore as surety, conditioned for the faithful performance of all the duties of said office and trust, and to well and truly pay and deliver or cause to be paid and delivered unto said Albert Marion Hescht and Gracilla Belle Hescht, orphans of Jacob Hescht deceased, all such estate, as then was or thereafter should appear to be due said orphans; the said Jacob Hescht having enlisted in the service of the United States in 1862, and having been killed in said service during the year 1862, leaving said Mary Ellen, his widow, and the said Albert Marion and Gracilla Belle, his only children, surviving him. Some time in the year 1863 his said widow intermarried with

one Isaac Newton Hubbs, who was a widower with eight children, and in the course of time said Mary Ellen became the mother of eight children by her said second husband, Isaac N. Hubbs. The appellants, Albert M. Hescht and Gracilla B. Hescht, at the time of their mother's marriage with said I. N. Hubbs, were respectively of the ages of four and two years. It appears, that they made their home for the first year after their father's death with their mother, and in the next March they went and lived with their grandfather, until their mother intermarried with said Hubbs, in July, 1863, and then they went and lived with their step-father and mother as a family, sometimes working out from home, and sometimes working on the farm. On the 3d day of August, 1879, said Gracilla B. Hescht intermarried with one J. F. Hyder, and at once left the home of her step-father, and went to live with her husband.

It seems from the deposition of Albert M. Hescht, filed in the cause hereinafter mentioned, that he and his mother and step-father and seven of the children lived together until he was twenty years of age, except that a part of the time, when he was small, he lived with his grandfather, Cornelius Vorhees, in Wetzel county, W. Va., and part of the time with his uncle, Charles Smith, and part of the time with another uncle David Harland two or three different times. After this he went to live with his step-father and the family, who were farming, and worked on the farm for Mr. Hubbs until he was about sixteen years of age. He then went to work in the Pittsburgh stove-factory and worked for about two years. While working at said factory he lived at home, and, what he could save after buying his clothes, gave to his mother and step-father for the support of the family, or bought supplies for the family and took them home. When he was eighteen his step-father had bought a farm on the waters of "Proctor," and moved on to it, and he went with them and worked on the farm for one year. When he was nineteen years of age, he went to work at the carpenter's trade with one David Windgrove and worked with him that fall and that winter; that when he was twenty years of age, he went to Jackson county, W. Va., where he remained with his cousin for about five months, when returning to Wetzel

county he lived with Henry Hubbs. In the month of November, 1875, when said Albert M. Hescht was not quite seventeen years of age, and his sister was about fifteen years of age, a pension was granted them by the United States government upon the application of their said guardian, A. G. Calvert; and according to the statement of said guardian he received for his wards, in December, 1875, the sum of \$1,505.53.

On the 20th day of December, 1882, said A. G. Calvert seems to have gone before one W. S. Wiley, a commissioner of accounts, and made a settlement of his accounts as guardian for appellants; and said commissioner found, that said guardian had received altogether for his said wards the sum of \$1,715.53, and that he had paid out for their use and benefit \$1,335.55, leaving a balance due them of \$379.98 when they arrived at the age of twenty one years. Said commissioner however further reported, that in his opinion said guardian should be allowed for his commissions and services in attending to the interests of his said wards from the time of his appointment the sum of \$115.00 and deducting that sum from the balance in said guardian's hands at the time said Albert M. Hescht arrived at the age of twenty one years (\$379.98) shows a balance due said wards of \$264.98, and, deducting costs, \$7.00, would leave a net balance due said wards at the time they arrived at twenty one years of age of \$257.98; that one half of that sum was due Albert M. Hescht, and one half due Gracilla B. Hescht, being \$128.99 due each of them; and that after said Albert M. Hescht arrived at the age of twenty one years he had been paid by his said guardian \$178.00, which would leave a balance due said guardian of \$49.01; and that Gracilla B. Hescht, after she arrived at the age of twenty one years, had been paid by her said guardian \$175.00, leaving a balance due said guardian from her of \$46.01.

To surcharge and satisfy this account settled as aforesaid before Commissioner W. S. Wiley this suit was brought at February rules 1886, in the Circuit Court of Wetzel county, and plaintiffs allege that they at no time had any settlement with their said guardian; that the accounts laid before said Commissioner Wiley are by no means correct, and they charge.

the same to be incorrect; that said account does not contain the true amount of money received by said Calvert as their guardian, or paid out by him; that he sought only to account for \$1,715.58, instead of \$1,741.46, with which he was properly chargeable; that the charges allowed said Calvert in said report are unjust and incorrect; that he has charged the plaintiffs with \$1,056.00 paid by him to their mother as of December 4, 1875, when there was no such just charge against them, and none such could have been properly made against them; that in support of said charge said guardian presented a pretended voucher, dated January 25, 1876, for said sum of \$1,056.00, purporting to be an account in favor of Isaac Hubbs and Mary E. Hubbs for keeping, clothing and schooling plaintiffs for eleven years up to December 4, 1875, which purports to be receipted by said Isaac and Mary E. Hubbs as of 15th day of January, 1876. The plaintiffs charge, that said item is erroneous, in that the same or the greatest proportion thereof was barred by the statute of limitations at the time it was paid, if ever paid; in that said Calvert had no right as such guardian to pay out for the support, keeping, clothing or schooling of the plaintiffs any thing more than the annual income of their estate, the rents, issues and profits thereof, without an express order from a court of competent jurisdiction, which they deny was ever obtained by him, because there never had been any such indebtedness incurred by said guardian; that the same was without consideration moving from the mother or from said Hubbs, as they had more than paid for any and all expenses to which their mother and said Hubbs had ever been put to in such keeping *etc.*; that the further items of \$105.00 as having been paid June 23, 1877, and \$100.00 as having been paid June 6, 1879, were erroneous and improper for the same reason; that instead of taking care of said estate, and rendering an account thereof during the infancy of appellants, he paid them various sums of money, which he had no right to do, and which amounts were allowed as credits to said Calvert upon his said settlement before said commissioner, and were erroneous charges, which said several unjust charges amount in the aggregate to the sum of \$1,356.00. They further allege that it was the duty of said guardian to

loan out the said sum of money so coming into his hands, and to preserve the same for them; that since their arrival at the age of twenty one years the said Calvert had paid to the said Albert M. Hescht the sum of \$113.00 and to the said Gracilla B. Hescht the sum of \$145.00 but no other sum, and that there is still due the plaintiffs the sum of \$1.668.01, with interest from January, 1876; and that the said Calvert, having failed to make and return a settlement before a commissioner, as required by law, forfeited all right to any commissions for his services; and that the report of Commissioner Wiley is erroneous in that it allows credit for such services amounting to \$115.00.

The defendants, A. G. Calvert and Wilfred Moore, at the September term, 1886, of said Circuit Court, demurred to plaintiffs' bill and pleaded the statute of limitations, and the defendant A. G. Calvert filed his separate answer to the plaintiff's bill. The defendant Calvert in his answer admits the allegations of plaintiffs' bill as to his appointment and qualification as guardian for plaintiffs and as to his executing bond as such guardian with one Wilfred Moore, his co-defendant, as surety, also as to the age of plaintiffs, the time and manner of the death of their father, Jacob Hescht, and also that plaintiffs were his only heirs at law; that in the latter part of the year 1875 a pension was granted them and their mother, Mary Ellen Hescht, widow of said Jacob, by the government of the United States, but claims that said pension was not for the sum of \$1,530.50, as stated in the bill, or at least that he only received \$1,505.53 with a stipend of allowance of \$30.00 every three months; and he denies that he received every three months \$30.93, as charged in the bill, but only the sum of \$30.00 each quarter. He says, that, at the time said money was received said Albert M. Hescht was 16 years of age or about that age, and his sister, Gracilla B., was about the age of fourteen or fifteen years. He denies, that they were constantly employed in the labors of the family, or that they were compelled to and did earn their livelihood by rendition of any services to their mother or any one else, and alleges that on the contrary they were idle and of a roving disposition; that they were not disposed to attend school, and could be compelled to do so with

difficulty by their mother and step-father. He denies, that the plaintiffs had no notice of the settlement with W. S. Wiley, commissioner of accounts, but claims, that he notified them personally as to the time, when said settlement would be made, and that they were fully aware, that their mother would prove her demand, and agreed, that the said demand was correct and just. He claims, that the same was not barred by statute, in whole or in part; that no such objection was then urged by them against said claim, nor at the time when said report was presented to the proper court for confirmation; they did not make such objection, at the time the various sums of money were paid to them, after they became of age; that all of the charges made in said account are lawful and proper charges against the estate of his wards, and the report was lawfully confirmed by the county court of Wetzell; that the charges made by Ellen Hubbs, mother of his said wards, was for boarding, clothing and books for schooling and were necessary, proper and lawful charges; that he furnished to said Albert M. Hescht the sums of \$20.00 and \$45.00 before he reached his majority,—the first was borrowed money, which he agreed afterwards should be charged to his estate, and the second was for a horse colt, which he much needed, and which he agreed should be charged to his estate, after he came to his majority; that the money furnished Gracilla B. Hyder was at the time of and after her marriage, but before she was twenty one, except the \$145.00,—this was given her after she was twenty one years of age. Said Calvert also files as part of his answer a letter from the commissioner of pensions of the United States government to show that he acted in good faith towards plaintiffs, and also to show, that they are properly chargeable with an account for food, clothing and tuition, and that such a charge is proper according to the intent of the statutes of the United States regulating the matter of the application of pension-money for the benefit of the children of deceased soldiers.

Upon this state of pleading, on the 2d day of October, 1886, a decree was entered in said cause requiring J. W. Newman, one of the commissioners of the court, after giving personal notice to the parties of the time and place at least ten days previous, to take an account and state and re-

port it to the court together with the evidence: *First*. What sum of money, if any, came into the hands of A. G. Calvert, guardian of Albert M. Hescht and Gracilla B. Hescht, now Gracilla B. Hyder, by virtue of the pension certificate named in the bill and received by him, for which he executed the said voucher No. 575; and what sum or sums were thereafter received by him from the government of the United States for the benefit of his said wards, including in this amount all sums of money received by him as such guardian from the month of December, 1875, until the year 1882 inclusive. *Second*. What sum of money was paid out and expended by him for the benefit of said Albert M. Hescht and Gracilla B. Hyder, when, where, to whom and for what purpose said money was paid, and any other matter deemed pertinent, or required by any party in interest. And it was provided, that depositions of the complainants theretofore taken and filed in the cause should be considered by the commissioner without exception, except that the same might be contradicted by competent testimony; and that the report of the commissioner of accounts sought to be surcharged and falsified by complainant's bill should be taken as *prima facie* evidence of the correctness of said account but liable to be surcharged and falsified by proper testimony in any particular specified in complainant's bill.

On the 17th day of January, 1887, said commissioner, J. W. Newman, returned his report in pursuance of said decree and with it a notice, which seems to have been served upon him, "that the complainants would ask and insist, that said commissioner take into account in his report in this cause to the court the respective amounts due each of the complainants, Albert M. Hescht and Gracilla B. Hyder, based upon the evidence in this case and a letter filed before said commissioner from the pension department of the United States showing, that there was paid to said A. G. Calvert, guardian *etc.*, for the use of Albert M. Hescht the sum of \$767.93 and for the use of Gracilla B. Hyder, \$973.53, respectively, instead of upon the basis of an equal amount due to each one, as was done by the commissioner of the County Court." Said commissioner in making up his report credited said A. G. Calvert as guardian as aforesaid with \$1,056.00

paid to Mary E. Hubbs as of December 4, 1875, also with \$100.00 as of January 6, 1879, for boarding and caring for said wards, also \$105.00 as of June 23, 1878, for clothing *etc.*, and \$10.00 as of December 10, 1887, paid to her to procure books for said wards; aggregating the sum of \$1,271.00; and after allowing other minor sums the entire amount allowed said guardian for expenditures for said wards, while they were minors, aggregates \$1,335.55; and after charging him with \$1,715.53, the amount received by him for said wards, and crediting him with the amounts paid by him to said wards, since they attained their majority, he finds a ballance due said guardian from Albert M. Hescht of \$49.01 and a balance due said guardian from Gracilla B. Hyder of \$46.09.

The complainants by counsel excepted to said report for the following reasons: "(1) Instead of following the direction of the order of reference it 'finds and reports the result of his investigations,' and that report is not in accordance with law, equity or the evidence in the cause. (2) No evidence is returned or referred to to support the report. There is not evidence to support the item of \$1,056.00 paid December 4, 1875, to Mary E. Hubbs, or of \$100.00 paid January 6, 1879, to Mary E. Hubbs, or \$105.00 paid June 23d to Mary E. Hubbs; but they are all shown to be improper and unjust. (3) In that there is allowed guardian for services from time of his appointment for all services rendered \$115.00, while it is charged and fully proven, that the defendant forfeited all claim to any compensation by not making annual settlements as required by law. (4) It allows credit to guardian for \$20.00 paid A. M. Hescht in February, 1880, and \$45.00 paid him May 20, 1880, in cash, as having been paid him after he attained his majority, while the evidence shows it was paid during his minority, which were improper and illegal charges or credits. (5) Report allows credit to guardian for \$10.00 paid July 5, 1879, and for \$20.00 paid November 8, 1880, to Gracilla B. Hyder, after she became twenty one years old, while the bill charges, and the evidence shows clearly, and it is not denied in the answer, that these sums were paid to her while a minor and infant in money, and are improper and unjust charges or credits; (6) The commis-

sioner ignores the plea of the statute of limitations and allows credit to guardian for moneys claimed to have been paid to Mary E. Hubbs aggregating \$1,261.00 without any verified account of same, when the greater part was barred. These plaintiffs, owners of other estate, made no attempt to collect it from lands, and that too, when the money so paid was pension-money exempt from execution, that could be held by them and should have been so claimed and held by their guardian. (7) Because the findings of commissioner are contrary to the weight and preponderance of the testimony and unsupported by evidence, and for the many errors apparent upon its face. (8) Because it is evident that partiality or undue influence has prompted the commissioner. (9) In not crediting Albert M. Hescht and Gracilla B. with work performed for the family of Isaac and Mary Ellen Hubbs. (10) Because commissioner did not adjust the accounts so as to show the amounts received by the guardian for each ward, to wit, \$973.53 for the use and benefit of Gracilla B., and \$767.93 for the use of Albert M. (11) For not reporting that subsequently-acquired property is not subject to the payment of claims for maintenance *etc.* of wards especially claims in favor of parents. (12) Because commissioner did not charge the guardian with interest, as the law requires. Whereof they pray, that the report be not confirmed but corrected by the court or recommitted to some other commissioner of the court with directions to ascertain, state and report a correct and true account."

On the 11th day of June, 1887, this cause came on to be heard upon the bill and exhibits, the answers of defendants, general replication by complainants, former orders and decrees, plea of the statute of limitations filed by defendants and issue thereon by complainants, and upon the report of James W. Newman, the commissioner, to whom the same was referred, and the depositions therewith returned filed in the cause on the 17th day of January, 1887, and the exceptions of complainants to said report, and upon the motion of the defendants to dismiss the suit, because T. B. Harness was not made a party, which last-named motion the court, as I think, properly overruled. The court then by its decree proceeded to overrule said exceptions to said commissioner's

report and after overruling the same held, that the said report should be reformed and amended so as to state the accounts of said Albert G. Calvert as guardian of Albert M. Hescht and as guardian of Gracilla B. Hescht, now Hyder, separately, and that for this purpose the said account of the said Albert M. Hescht should be credited with the sum of \$767.93, that being the amount of the pension-money allowed him, and charged with the sum of \$12.50, that being the one half of the attorney's fee allowed in the pension-case by law; and the further sum of \$667.78, being one half of the credits allowed the said Albert G. Calvert in his settlement with W. S. Wiley, the commissioner of accounts; and also the sum of \$57.50, being one half the sum allowed by said commissioner of accounts to the said Albert G. Calvert, guardian, for his services in procuring said pension; and the sum of \$3.50, being one half the charge of costs of settlement with said commissioner of accounts; and the further sum of \$178.00, paid to him by his said guardian, A. G. Calvert, before final settlement on the 20th day of December, 1882,—which account thus stated shows a balance due from said complainant A. M. Hescht to the said defendant A. G. Calvert, on the 20th day of December, 1882, of \$151.35, which with interest computed thereon to the 20th day of May, 1887, amounts to the sum of \$191.40, which the defendant A. G. Calvert was entitled to recover of the complainant A. M. Hescht; and that the account of said complainant Gracilla B. Hyder, formerly Gracilla B. Hescht, should be credited with sum of \$973.53, that being the amount of pension-money allowed her, and charged with the sum of \$12.50, that being one half of the attorney's fee allowed in the pension case by law; and the sum of \$667.78, being one half of the credits allowed said Albert G. Calvert by W. S. Wiley, commissioner of accounts, on settlement; and also the sum of \$57.50, being one half the sum allowed by said commissioner of accounts to the said Albert G. Calvert, guardian, for his services in procuring said pension; and the sum of \$3.50, being one half the charge for costs of settlement with said commissioner of accounts; and the further sum of \$175.00, paid to her by the said A. G. Calvert, guardian, before final settlement on the 20th day of December, 1882,—which account thus stated

shows a balance due from the said defendant, A. G. Calvert, to said complainant, Gracilla B. Hyder, on the 20th day of December, 1882, of \$57.25, which, with interest computed to the 20th day of May, 1887, amounts to the sum of \$72.51, which the complainant Gracilla B. Hyder was entitled to recover of the defendants Albert G. Calvert and Wilfred Moore.

From this decree of the Circuit Court of Wetzel county overruling the exceptions to the report of Commissioner J. W. Newman filed by the complainants, and stating the account between said guardian and his wards in the manner in said decree set forth, this appeal was taken by the plaintiffs in said bill.

The questions to be determined in this case are raised by the exceptions filed to Commissioner Newman's report. Did the court below commit an error in overruling and disregarding said exceptions? At the time the bulk of the pension-money was received by said guardian, amounting to \$1,505.53, his wards were respectively seventeen and fifteen years of age, and the residue of said pension-money was received between that date (January, 1876) and February, 1878. This money came into the hands of said guardian, as any other money, to which they were entitled, would come. The reason, why a guardian is required by law to be appointed for infants, is, that their estates may be protected not only from strangers but, as experience indicates, more frequently from the avaricious designs of their nearest relatives. The guardian in this case evinced some prudence and caution by consulting the commissioner of pensions for instructions as to the disposition, which he should make of the pension-money received for his wards; but unfortunately for him it seems, that this letter of inquiry was not written until the 15th day of January, 1876, and according to his own voucher returned before the commissioner of accounts he had taken the responsibility of paying to Mary E. Hubbs, the mother of his said wards, \$1,056.00 of said pension-money on the 4th day of December, 1875, more than a month before he wrote said letter, and was credited with that amount as of that date; and it will be seen by reference to the reply sent to him by H. M. Atkinson, commissioner of pensions, that he

did not follow the advice and instructions therein contained as to the residue of the money received by him as pension-money for said wards. Said commissioner writes:

“ The design in granting pensions to children under sixteen years of age unquestionably was that this bounty of the government should be used in supplying them with a home, food, clothing, books, tuition, and other necessities during their helpless infancy and minority, and, if all the pension-money is needed for these purposes, it should all be used without hesitation. Whoever furnishes these supplies, the mother included, should be paid for them what is just and equitable upon a properly stated and itemized account, allowed and approved by the court having probate jurisdiction, which then becomes a voucher for you in the settlement of your account as guardian. In cases where the pension is not all needed for the comfortable support of the children, any surplus should be safely invested for their benefit, and paid only to them. The mother has no claim upon such surplus, nor does her claim upon the children's pension-money differ in any respect from that of a stranger.” This letter of advice seems to vary but little from the terms of our statute in regard to the duties of guardians, (chapter 82, § 8, of the Code,) which provides that “ no disbursement shall be allowed to any guardian where the deed or will under which the estate is derived does not authorize it beyond the annual income of the said ward's estate, except * * * when (although old enough to be bound out as an apprentice) it shall be deemed best for the ward that the principal of his personal estate, or a portion thereof, should be applied towards his education or maintenance. But the guardian shall, before thus applying any part of such principal, file his petition before the Circuit Court of the county in which he was appointed for the permission thus to apply the whole or a portion of said principal, in which petition he shall state the facts relied on by him to induce the court to grant the prayer of the petition. * * * Upon the hearing of the case the court may grant or refuse the petition, as to it may seem judicious and proper. No credit shall be allowed the guardian in the settlement of his accounts for expenditures for his ward under this section except for disburse-

ments of the annual income of his ward's estate, and for such amounts as the said court shall have first authorized to be expended of the principal of his personal estate, as hereinbefore provided."

If said guardian had availed himself of the provisions of this statute, his disbursements made in pursuance of an order of the court thus obtained would have been properly allowed by the commissioner; but, in the absence of such an order and under the circumstances disclosed by the evidence in this case I can arrive at no other conclusion, than that neither the commission of accounts, W. S. Wiley, nor J. W. Newman, commissioner of the Circuit Court, was authorized to allow said guardian credit for the sum of \$1,056.00 paid Mary E. Hubbs December 4, 1875, the \$100.00 paid her June 6, 1879, the \$105.00 paid her June 23, 1877, or the \$10.00 paid her December 10, 1877; and I am of opinion, that the court below erred in reforming and amending said guardian's account, as it did, upon the bases of the credit allowed him by W. S. Wiley, commissioner of accounts. Said decree is correct in crediting to Albert M. Hescht the sum of \$767.93, that being the amount of the pension-money allowed him; and in crediting Gracilla B. Hyder, formerly Gracilla B. Hescht, with the sum of \$973.53, that being the amount of the pension-money allowed her; but the court erred in ascertaining the amount, with which said wards should be respectively charged, by dividing the credit allowed said guardian in his settlement with Wiley, commissioner and charging one half to each. That would seem to be wrong, if for no other reason, because there is no itemized account, and no evidence in the cause, that the expenses of schooling, clothing and maintenance of said wards were equal. There was a difference of two years in their ages; and, while both worked away from home a considerable part of the time, and both helped to support the family while at home and away, yet there is nothing to indicate, that the costs of supporting and schooling them were the same, but on the contrary many things, which would indicate, that the amount of assistance they received from their mother and step-father were widely different. As to the credit then of \$1,056.00, with which said guardian is credited as of December 4,

1875, there seems to have been no itemized account and no proof sufficient to sustain it.

Mrs. Mary E. Hubbs, the party, to whom said amount seems to have been paid by said guardian, in giving her deposition, when asked to state who furnished the clothing for Albert, until he was twenty one, answered: "His clothing was furnished by different ones. My father furnished some, and a good part they got themselves." When asked: "Who furnished for Gracilla B.?" she answered: "She got a good many herself, and Mr. Hubbs furnished some, and my father some." When asked: "How was it as to board?" she answered: "When they were at home they boarded there, and when they worked away they boarded where they worked, except when Albert worked at the stove-factory, he then boarded at home." When asked: "When so working out did they contribute to the expenses of the rest of the family?" she answered: "Albert sometimes got some things for the rest of the family." When asked what they did when at home, she answered: "They helped work in the field, when there was work to do raising crops; both Albert and Belle." When asked where and for whom Gracilla B. worked when away from home, she answered: "She worked away from home for Mrs. Yoho; also for Mrs. Harlands, most of one winter; at Gilbert Vorhees about three months. She also stayed awhile with Mrs. Greene, and Mrs. Buchanan; a while at Jack Moore's, John Cochran's, Mrs. Dunlap's, and with a man living in Dunlap's house, at Simon's, and at W. Wingrove's." And she also stated that Albert worked at the stove-factory, while he was away from home, one winter, with his uncle Charles Smith; was with his grandfather for some time after her marriage with Hubbs; worked at a job for Mr. Alexander; worked some at the carpenter's trade; and was in Jackson county part of one winter; and that they sometimes did not go to school, because their clothes were not fit; that she never made out any account. She thought the account was for \$1,000.00; the \$56.00 she knew nothing about. It seems, that the voucher produced before the commissioner was merely a receipt bearing date December 25, 1875, annexed to an account which reads as follows:

"A. G. Calvert, guardian of the minor children of Jacob Hescht, deceased, private of Co. F, 15th Ohio Vol. Inf'ty in the war of 1861, in account with Isaac Hubbs and Mary E. Hubbs, Dr. To keeping, clothing, and schooling Albert M. Hescht and Gracilla B. Hescht for eleven years up to Dec. 4, 1875, \$1,056.00.

"Jan. 25, 1876, received the above \$1,056.00 from A. G. Calvert, guardian of Albert M. Hescht and Gracilla B. Hescht, infant children of Jacob Hescht, late private of Co. F, 15th Ohio Vol. Infan'ty.

[Signed]

"ISAAC HUBBS,
"MARY E. HUBBS."

The sum of \$105.00 was allowed as of June 23, 1877, and \$100.00 as of January 6, 1879, on similar vouchers. Under section 4702 of the United States pension-laws it seems, that the child or children of certain deceased soldiers are entitled to a pension, which under the law goes into the hands of the guardian to be administered. The commissioner of pensions in his letter of January 15, 1876, instructs the guardian, that "the design in granting these pensions to children under sixteen years of age was to supply them with home, food, clothing, books, tuition and other necessities during their helpless infancy, and if all the pension-money is needed for these purposes, it should all be used; that whoever furnishes these supplies, the mother included, should be paid for them what is just and equitable upon a properly stated and itemized account, allowed and approved by the court having probate jurisdiction, which then becomes a voucher for you in the settlement of your accounts as guardian. In case the pension is not all needed for the comfortable support of the children, any surplus should be safely invested for their benefit and paid only to them. The mother has no claim upon such surplus, nor does her claim upon the children's pension-money differ in any respect from that of a stranger."

Now, it seems, that the application for this pension was delayed for some five or six years, and in the mean time the wards arrived at the ages of sixteen and eighteen. Whatever assistance had been rendered to said wards by Mary E. Hubbs and her husband in the way of keeping, clothing, and schooling could only be properly ascertained by an in-

vestigation of the manner, in which they had been reared and cared for during a good many years; but these claims seem to have been presented to the guardian not in the shape of an itemized account not verified by affidavit and not having received the sanction or approval of any court. If then the mother's claim upon the children's pension does not differ from that of a stranger, as the commissioner of pensions indicated in his letter,—and I think he is correct in that,—I can not see how this pension-money as to debts, which have already accrued differs from any other money belonging to said wards, which may be in the hands of said guardian; and it seems to me, that the guardian should require as full proof in regard to claims of this character as any other; and if the recovery of said claim or any portion of it could be prevented by illegality of consideration or lapse of time or by any other fact within his knowledge, the guardian must avail himself of such defence, or he can obtain no credit. The letter of instructions above referred to from the commissioner of pensions indicates, that such claim should be paid by a guardian upon the properly itemized account, allowed and approved by the court having probate jurisdiction. Under our statute before applying the principal or any part thereof the guardian must file his petition before the Circuit Court of the county, in which he was appointed, for permission thus to apply it, (Code c. 82, s. 8), otherwise he can only disburse the annual income; and this guardian should have presented his petition under this section before disbursing the principal of his ward's estate. Again, the Code c. 87, s. 7 is clear and explicit, that "any such fiduciary, who shall wholly fail to lay before such commissioner of accounts a statement of receipts for any year within six months after its expiration, shall have no compensation whatever for his services during said year." I am of opinion that, under this provision of the statute, the court erred in allowing said guardian the sum of \$115.00 for his services, and directing the same to be paid equally by his wards. Said guardian however should have been allowed any reasonable expenses incurred by him as such. See Code c. 87, s. 17. See, also, *Strother v. Hull*, 23 Gratt. 670; 1 Min. Inst. 458, 459. I am further of opinion, that said guardian should not be credited

with cash paid his wards during their minority, unless the proof is clear, that said wards ratified said payment by some act or assent of theirs after attaining their majority, and the said guardian should have been charged with interest as prescribed in Code c. 82, s. 10 upon balances of money in his hands at the end of any year.

The decree of the Circuit Court of Wetzel county rendered on the 11th day of June, 1887, in this cause must be reversed, and the cause remanded to said Circuit Court for further proceedings to be had therein; and the appellants must recover their costs in this court.

REVERSED. REMANDED.

CHARLESTON.

BANK v. CORDER.

*(GREEN, JUDGE, absent.)

Submitted January 19, 1889—Decided February 25, 1889.

1. DEED—HUSBAND AND WIFE.

A deed of conveyance bearing date the 8th day of June, 1850, to a husband and wife residing in Barbour county, then in Virginia, for a tract of land situated in said county did not confer upon the husband title to the undivided moiety of said land, but said husband and wife took by entreties. (p. 241).

2. DEED—HUSBAND AND WIFE—DEBTOR AND CREDITOR.

A creditor of the husband files a bill to subject the real estate of the husband to the payment of his debt. It is error in the court upon the above state of facts in regard to the acquirement of title by the husband and wife to hold, that the husband is entitled in fee-simple to the undivided one half interest in said tract of land, and to direct said undivided half to be sold for plaintiff's debts. (p. 243.)

3. DEED—FRAUD—DEBTOR AND CREDITOR.

Although a deed may be fraudulent and void as to creditors, it is nevertheless valid and binding between the parties to the fraud, which brought it into existence; and it is error in the court to set aside and annul such deed *in toto*. (p. 242.)

*On account of illness.

39	239
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d 52	627

4. DEED—HUSBAND AND WIFE—DEBTOR AND CREDITOR.

A deed of conveyance is made directly from the husband to the wife for a tract of land, and as part of the consideration she agrees to pay B. \$300.00 and H. \$100.00 with interest on said amounts, which the husband owes to B. and H., and to secure which amount the vendor's lien is reserved. Although said deed may be set aside as to general creditors as fraudulent, the liens thus reserved must be respected as liens on the equitable title conveyed as of the date of the recordation of said deed, if said claims are valid in other respects. (p. 241)

J. Bassell and Dayton & Dayton for appellants.

S. V. Woods for appellee.

ENGLISH, JUDGE:

In November, 1884, the Farmer's Bank of Phillippi filed its bill in the Circuit Court of Barbour county against Thomas Corder and Elizabeth Corder, his wife, Anthony F. Daniels, Erwin Douglas, John H. Daniels, Benjamin Bartlett and James E. Heatherly under the Code c. 133, s. 2, which provides: "A creditor before obtaining a judgment or decree for his claim may institute a suit to avoid a gift, conveyance, assignment or transfer of or charge upon the estate of his debtor, which he might institute after obtaining such judgment or decree, and he may in such suit have all the relief in respect to said estate, which he would be entitled to after obtaining a judgment or decree for the claim, which he may be entitled to recover."

In its bill the plaintiff alleges, that on the 10th day of May, 1884, the defendants Anthony F. Daniels, Erwin Douglas, Thomas Corder and John H. Daniels executed to it their promissory note for \$1,500.00 due 120 days after date, and thereby jointly and severally promised to pay plaintiff or order at its banking house in Phillippi the sum of \$1,500.00 with interest after maturity at eight *per cent. per annum*, the whole of which remains unpaid; that at the time said note was made, and at the time of making the voluntary conveyance thereafter named, the defendant Thomas Corder was the owner in fee-simple of the undivided one half of a certain tract of land in said county, containing 168½ acres, which was conveyed to him and his wife, the said Elizabeth Corder, as tenants in common by Peter Zinn and wife by

deed dated the 8th day of June, 1850, also a tract of about eight acres being his share of the upper meadow devised to him and David Zinn by the last will and testament of Peter Zinn, also of about three acres, which were devised by the same will, which bears date May 1, 1866, and also of a tract of eight acres adjoining said 168½-acre tract, which was conveyed to said Thomas Corder by Nancy Heatherly and others by deed dated May 1, 1854, and of another tract containing 11½ acres adjoining said 168½ acre tract, which was conveyed to him by Henry O. Middleton by deed dated February 2, 1853.

The plaintiff also alleges, that on the 23d day of August, 1884, said Thomas Corder conveyed to his wife all of said real estate; also one bay horse, one white cow, three hogs and ten sheep, part of the personal property then owned by him, with intent to hinder, delay and defraud the plaintiff in the collection of its said claim for the pretended and false consideration of a debt of \$964.00 therein recited to be due from him to his said wife for borrowed money, and for the further consideration of \$300.00 to be paid by his wife with its accrued interest to the defendant, Benjamin Bartlett, and \$100.00 to be paid with its accrued interest by her to the said James E. Heatherly, which last two sums are charged upon said land as a lien by the terms of said conveyance; that, at the time said conveyance was made, said Thomas Corder was not indebted to his said wife, and that she well knew the intent, with which said conveyance was made; that between the time of the execution of said note and the execution of said last-named deed the defendants Anthony F. Daniels and John H. Daniels became and still remain utterly insolvent and worthless, of which fact the defendant Thomas Corder had notice, at the time he executed the said last-named deed, and that said deed conveyed all the real estate owned by said Thomas Corder: that at the time this suit was brought, to wit, on the 8th day of October, 1884, the plaintiff sued out an attachment therein, which on the same day was duly levied upon all the lands of the defendant, Thomas Corder.

The plaintiff prayed, that the said conveyance made by said Thomas Corder to his wife, Elizabeth Corder, might be cancelled and annulled as to the plaintiff's claim; that said

claim might be charged as a lien upon the land and personal property thereby conveyed, and that said attachment-liens might be enforced against said land by subjecting the same to sale.

At the December rules, 1884, the defendants Thomas Corder, James E. Heatherly and Benjamin Bartlett demurred to the plaintiff's bill, the last two assigning as cause of demurrer, that the bill is insufficient on its face, because it avers its demand to be a lien, and prays its enforcement as against the land conveyed to Elizabeth Corder; that there is no lien in fact, unless it arise under the attachment, which is a suit by itself apart from the matter of the bill, and which must stand or fall on the case made on it, nor is the attachment-order by its levy a lien or charge, unless sustained at the trial thereof and final judgment thereon; that the deed of Corder creates a lien and charge from the date of its recordation in favor of demurrants for their valid debts set out in said deed, as to which said Elizabeth Corder is made their trustee, and they have a prior and valid lien and charge over the plaintiff on said land; that the plaintiff's bill is defective in making no allegations concerning their interest, neither admitting nor denying them; that, if said bill was to be taken for confessed, there would be no foundation for any decree against them, and that it would be manifest error for the court to annul said deed and decree for the plaintiff to the prejudice of demurrants in the absence of all such averments made in its said bill, and the recitals of the deed in favor of their demands must stand before the court as valid till assailed; that there are in fact no allegations for the demurrants to have or maintain any issue or controversy about; and they insist, that the bill is demurrable and should be dismissed with costs.

An amended bill was filed by plaintiff at November rules, 1885, merely alleging; that, since they become seized of the lands alleged to have been conveyed to them by Peter Zinn, there have been born unto said Corder and wife many children capable of inheriting the estate, who are still living.

At the March term, 1885, said demurrers were overruled by the court, and on the 15th day of July, 1885, the defendants, Thomas Corder and Elizabeth Corder, filed their

answers to the bill, in which they admit the execution of the note for \$1,500.00 in the bill mentioned, payable as therein stated, and allege, that said note provided for the payment of an usurious and illegal rate of interest after maturity. They deny, that said Thomas Corder was the owner with the defendant Elizabeth, as tenants in common, of a tract of 168½ acres of land, as stated in plaintiff's bill, and claim, that the deed from Peter Zinn dated June 8, 1850, vested in each of respondents the entirety, with the right to the survivor to take the whole, and consequently said Thomas did not on the 10th day of May, 1884, and on the 23d day of August, 1884, have the right and title to one half of said land. They deny, that said deed of August 23, 1884, for said 168½ acres and the other parcels of land therein described together with the personal property therein described was made with intent to delay, hinder and defraud the creditors of said Thomas Corder, and more particularly to hinder, delay and defraud the plaintiff in the collection of its said debt, and they call for full proof thereof. They also say, that on the 23d day of August, 1884, and for a period long prior thereto the said Thomas did owe the said Elizabeth the sum of \$964.00 for money of said Elizabeth, which was her separate estate lent by her to said Thomas, and for which she had held his note since the 9th of February, 1880. They admit, that they knew their co-defendant, A. F. Daniels, was insolvent, when said deed of August 23, 1884, was executed, but deny, that they knew, that John H. Daniels was in the same condition. They admit, that an attachment was sued out and levied upon the property as alleged in the bill, but aver, that the allegations in the affidavit are not true.

The defendant Heatherly and Bartlett filed their joint answer denying any fraud in the deed of August 23, 1884, from Thomas Corder, to Elizabeth Corder, so far as they are concerned, claiming, that Thomas Corder was justly indebted to respondent Bartlett in the sum of \$300.00 for borrowed money, and that he was also justly indebted to respondent Heatherly in the sum of \$100.00, both of which sums were due and had been bearing interest for some time previous to that time; that said deed was made by said Thomas to said Elizabeth for the purpose of securing their

just debts and without any fraud or fraudulent intent on the part of any one, so far as these respondents knew, and certainly so far as their participation therein was concerned; that a vendor's lien was retained on the face of said deed to secure these respondents their just debts aforesaid; and they ask, by way of affirmative relief, that the decree setting aside said deed as fraudulent may be set aside, cancelled and annulled, at least so far as it deprives them of the security therein contained for their just debts, which remain wholly unpaid; and that the vendor's lien therein contained may be enforced in favor of them, and for general relief.

On the 21st day of July, 1886, a decree was rendered in said cause, reciting that the same was heard upon the attachment sued out therein and levied on the 23d day of October, 1884, by the sheriff of Barbour county upon the lands mentioned in said levy upon the process duly executed upon all the defendants *etc.*, the joint answer of Thomas and Elizabeth Corder, general replication thereto, and upon the exhibits and arguments of counsel. On consideration whereof the court below held, that the deed made by Thomas Corder to his wife, Elizabeth Corder, on the 23d day of August, 1884, is fraudulent and void as to the plaintiff, and set aside and annulled said deed and referred the cause to a commissioner to ascertain and report the lands owned by Thomas Corder, the state and condition of the title thereto, the annual rental value thereof, the liens thereon and their character, amount and priority, and the annual rental value of the moiety of Elizabeth Corder in the 168½ acre tract, also the value of the personal property mentioned in said deed; and whether the same or any part thereof has been aliened since the institution of said suit.

Said commissioner on the 24th day of September, 1886, proceeded to execute said reference, closing his report on the 28th day of September, 1886, and reported, that Thomas Corder was the owner of the following tracts of land: One tract of three acres, another tract or moiety thereof known as the "Upper Meadow," (see Peter Zinn's will marked "D"); also another tract of eight acres conveyed to him by Nancy Heatherly *etc.*; also another tract of 11½ acres conveyed to him by Henry O. Middleton, and a moiety

of 168½ acres conveyed to him and Elizabeth Corder and her heirs by Peter Zinn, referring to copies of said deeds and will filed with plaintiff's bill, and reporting the title good, so far as he could ascertain. Said commissioner also reported the annual rental value of said lands and the value of the personal property and the following liens on said lands: (1) A judgment in favor of J. N. B. Crim against Joseph Martiny and Thomas Corder, \$130.84; (2) lien in favor of Farmers' Bank of Phillippi against Thomas Corder and others, \$1,708.33; (3) a judgment in favor of J. N. B. Crim against Thomas Corder, \$452.20; (4) a decree of the Circuit Court of Barbour county, dated March 17, 1886, for costs against Thomas Corder for \$25.55. Said commissioner also reported by way of pertinent matter at the request of Elizabeth Corder, Benjamin Bartlett and James E. Heatherly, defendants in said suit, that they claimed their respective debts with interest on each, named in the deed to Elizabeth Corder dated August 23, 1884, filed among the papers of the cause as Exhibit H.

Said commissioner's report was excepted to by plaintiff, because it failed to report Thomas Corder as the owner in fee of said 168½ acre tract of land instead of a moiety thereof. The defendants, Thomas Corder and Elizabeth Corder, also except to said report, upon the ground that only the life-estate of Thomas Corder during the joint lives of said Thomas and Elizabeth in the 168½ acres of land is liable to be subjected to the payment of plaintiff's debt. The defendants, Bartlett and Heatherly, excepted to said report, because their debts were not reported as vendors' lien upon the lands of said Thomas Corder.

This was the attitude of the case, when it was brought on to a final hearing on the 30th day of October, 1886, when the court overruled said exceptions to said commissioner's report and confirmed the same in all respects, holding that the said Thomas Corder was the owner in fee of said three acres, said eight acres, his share of the upper-meadow tract, of eight acres conveyed to him by Nancy Heatherly *etc.*, eleven and a quarter acres conveyed to him by Henry O. Middleton, and also of one undivided half interest in his home-tract of 168½ acres devised to him and his wife by

Peter Zinn, situated in Barbour county, and confirming the finding of said commissioner as to the amount and priorities of the liens existing against said lands, and directing a sale of said lands or so much thereof as may be necessary to pay off said liens.

The first assignment of error relied on by the appellants is, that the demurrer to the bill should have been sustained. Although in this case the court without acting *pro forma* upon the demurrer proceeded to determine and adjudicate the principles of the cause in favor of the plaintiffs, yet in accordance with the ruling of this court in the case of *Hinchman v. Ballard*, 7 W. Va. 152, fifth point of syllabus, "it will be considered that the court in rendering the decree adjudicating the principles of the cause considered the sufficiency of the bill and substantially overruled the demurrer thereto," and for the purposes of this case the demurrer filed by the defendants must be considered to have been overruled. Did the court below commit an error in this ruling?

As I understand the practice, a demurrer admits the matters stated in the bill, which are well pleaded, that is, matters of fact. It does not admit matters of law, which are suggested in the bill or inferred from the facts stated. If then the facts alleged in the bill in regard to the conveyance made by said Thomas Corder be taken as true, the court acted properly in overruling the general demurrer filed by him. As to the demurrer filed by Benjamin Bartlett and James E. Heatherly the plaintiff in its bill alleges, that said Thomas Corder made said conveyance to his wife of said real and personal property for the pretended and false consideration of a debt of \$964.00 therein recited to be due from him to his said wife for borrowed money, and the further consideration of \$300.00 to be paid with its interest to Benjamin Bartlett, and \$100.00 to be paid with its accrued interest by her to the said James E. Heatherly, which last two sums are charged as a lien by the terms of said conveyance, and the prayer of the bill is that said conveyance made by Thomas Corder to his wife may be cancelled and annulled as to plaintiff's claim.

Now, while it is true that no action is prayed against the defendants, Bartlett and Heatherly, they are necessary parties

to the bill brought by plaintiff to subject the said tract of land to sale. It is not alleged in the bill, that their claims are fraudulent, or that the liens reserved in their favor by said deed are invalid; neither is there any prayer, that the lien reserved in their favor may in any manner be disregarded. Their interests are not assailed by the bill, and I think the court acted properly in disallowing their demurrer; but upon the hearing I am of opinion, that their liens should have been respected, and the commissioner should have given them a proper place in his account when stating the liens against said land and their priorities, which would be the date said deed was recorded, as their liens created by said deed must be respected as of that date.

Upon the case presented by the pleadings and exhibits, and in the absence of other evidence, as there seems to have been no depositions taken in the cause by either party, and under the circumstances appearing from the record, the defendant, Thomas Corder, having executed the promissory note for \$1,500.00 payable four months after date, one or two of those who signed said note with him becoming insolvent, as it alleged in the bill and admitted in the answer, and about three and a half months after said note was executed, a conveyance having been made to his wife, not only of all the real estate he owned but also a considerable portion of his personalty in consideration, as said Elizabeth says in her answer, for \$964.00 out of her separate estate, which she loaned him and took his note for as far back as February, 1880, I am of opinion under the rulings of this court, that in the absence of any proof on the part of the defendants Thomas Corder and Elizabeth Corder of the good faith of the transaction between them the court below properly concluded, that a case was presented, which would justify it in setting aside said deed of conveyance from Thomas Corder to his wife, Elizabeth Corder, as to his creditors.

In the case of *Burt v. Timmons*, 29 W. Va. 442 (2 S. E. Rep. 781), fifth point of syllabus, the Court holds: "A transfer of property, either directly or indirectly, by an insolvent husband to his wife, is justly regarded with suspicion, and unless it clearly appears to have been entirely free from intent to withdraw the property from the husband's creditors,

or the presumption of fraud be overcome by satisfactory affirmative proof, it will not be sustained."

In the case of *Lockhard v. Beckley*, 10 W. Va. 88, ninth point of syllabus it is held: "Fraud is to be legally inferred from the facts and circumstances of the case, when those facts and circumstances are of such a character as to lead a reasonable man to the conclusion that the conveyance was made with the intent to hinder, delay, or defraud existing or future creditors."

Also, in *Core v. Cunningham*, 27 W. Va. 206, this Court held: "Transfers of property, either directly or indirectly by an insolvent husband to his wife during coverture, are justly regarded with suspicion; and unless it clearly appears that the consideration was paid from the separate estate of the wife, or by some one for her, out of means not derived either directly or remotely from the husband, such transfers will be held fraudulent and void as to the creditors of the husband."

The decree however rendered in this cause on the 21st day of July, 1886, decides, that the deed made by Thomas Corder on the 23d day of August, 1884, to his wife, Elizabeth Corder, is fraudulent and void as to the plaintiff, and then proceeds to order, that said deed be set aside and annulled. This decree, as has been frequently held by this Court, is erroneous in directing that said deed be set aside and annulled *in toto*, because the deed would be held good as between the parties, and should only have been set aside as to the creditors of the grantor, and should have been held valid, so far as it provides for securing the debts of Bartlett and Heatherly therein mentioned.

Again, the final decree rendered in this cause on the 30th day of October, 1886, overrules the exceptions to the commissioner's report and, holding, that the defendant, Thomas Corder, is the owner in fee of the undivided half of the tract of 168½ acres conveyed to him and his wife, Elizabeth Corder, by Peter Zinn, directs the sale of said undivided half of said tract of land by a special commissioner therein appointed. The deed from Peter Zinn to said Thomas Corder and Elizabeth Corder bears date on the 8th day of June, 1850; and in the case of *Breckenridges v. Todd*, 3 T. B. Mon. 52, it is held, that the

date of a deed is presumed to be the time of its delivery. See also *Renick v. Ludington*, 20 W. Va. 512, 567. As the law was at the time of the execution and delivery of said deed, and as it remained until the 1st day of July, 1850, when the Code of 1849 took effect, an estate given to a wife and husband was not joint tenancy; each party took the entirety, and the survivor took the whole. See the case of *Thornton v. Thornton*, 3 Rand. (Va.) 179.

As to the deed from said Thomas Corder to his wife, while inoperative and void at law, it was nevertheless valid in equity and conferred upon said Elizabeth Corder a good and equitable estate, which in all cases could be enforced against the husband by a court of equity. See *McKenzie v. Railroad Co.*, 27 W. Va. 306. And such would be the effect of said deed, if free from fraud and valid, in other respects.

Again, as to the character of the title acquired by husband and wife, where a deed was made to them as in this case. In the opinion rendered by the court in *Bank v. Gregory*, 49 Barb. 155, JOHNSON, J., says: "To my mind it is a very clear proposition, that our recent statutes for the better protection of the separate property of married women have no relation to or effect upon real estate conveyed to husband and wife jointly. This was held by SUTHERLAND, J.; at special term, in *Goelet v. Gori*, 31 Barb. 314. In such a case the wife has no separate estate, but is seized with the husband of the entirety, neither having any separate or severable part or portion, but the two, as one in law, holding the entire estate. They hold thus not as joint tenants or as tenants in common but as tenants by entireties; and the same mode of conveyance, which would make two other persons joint tenants, will make the husband and wife tenants of the entirety,"—referring to *Jackson v. Stevens*, 16 Johns. 110; *Rogers v. Benson*, 5 Johns. Ch'y 431; and also to 2 Kent. Comm. 132, where it is said: "If an estate in land be given to the husband and wife, or a joint purchase be made by them during coverture, they are not properly joint tenants, nor tenants in common, for they are but one person in law, and cannot take by moieties. They are both seized of the entirety, and neither can sell without the consent of the other, and the survivor takes the whole."

In 1 Bish. Mar. Wom., under the head of estates by entailties, (section 621) the author says: "If the husband undertakes to aliene the estate, it is nugatory as against the wife, who may enter as survivor on his death." The books contain numerous expressions, from which it would even seem further to follow, that the sole conveyance of the husband, whether in terms broad or narrow, carries with it no estate and is a mere nullity not only as against the wife, who did not join in it, but also as against himself. In section 622, in speaking of the liability of such estate for the husband's debts, Bishop says: "For the same reason, that the husband's life-interest in the estate under consideration may be conveyed by his deed, it may also in just principle be seized by his creditor for his debt. There are some doubts and contradictions in the books on this point, but such is believed to be the more prevailing doctrine on authority. And it has been held that in such a case the sale of the husband's interest for his debt takes from him all his estate, whatever it may be, in the land."

If these authorities propound correctly the law upon the subject under discussion, as it existed previous to July, 1850, the commissioner manifestly erred when he reported, that the defendant, Thomas Corder, was the owner of a moiety of 168½ acres conveyed to him and Elizabeth Corder, his wife, and her heirs by Peter Zinn. Said Thomas Corder is entitled to a life-estate in said land, and in the event of surviving his said wife to the entire estate, but in the event she survives him, the estate would go to her. Whatever estate then the said Thomas Corder may eventually have in said 168½ acres of land, he surely did not own an undivided half of said land in fee simple, as the plaintiff claims in his bill, and as a commissioner found in his report; and I am of opinion, that the court erred in confirming said report and directing a sale of the interest so ascertained in satisfaction of the plaintiff's claim.

The appellants assign as an additional error, that "the court erred in not directing an inquiry as to the lands of the co-surety, Douglas, attached in the cause." But, so far as appears from the allegations of the bill, or the statements of the answers, no claim is made that said Douglas had or

owned any land ; neither does it appear from the allegations of the bill, that the attachment was levied upon any other lands than those of Thomas Corder, and under this state of pleadings and circumstances I do not regard it as error in the court not to direct an inquiry as to the lands of said Douglas. But, on account of the errors hereinbefore mentioned, I am of opinion to reverse the decree complained of in this cause ; and the same is remanded to the Circuit Court of Barbour county for further proceedings to be had therein and the appellee must pay the costs of this appeal.

REVERSED. REMANDED.

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CHARLESTON

CRUMLISH v. RAILROAD CO.
and
FIDELITY CO. v. SAME.

*(GREEN, JUDGE, absent.)

Submitted February 8, 1889.—Decided February 25, 1889.

1. CONTRACTS—PRESUMPTION OF LAW—BURDEN OF PROOF—CORPORATIONS.

Where the contract of a corporation purports to be sealed with its corporate seal, and it is proven to be signed by the proper agents of the corporation, the presumption is that the seal was affixed by the proper authority, and such contract will be held valid until the contrary is shown. (p. 257.)

2. CONTRACTS—PRESUMPTION OF LAW—CORPORATIONS—DIRECTORS.

The presumption of authority to affix the corporate seal to a contract will not be overcome by the mere fact, that no vote of the directors authorizing it is shown. (p. 257.)

3. NOTICE—TRUSTS AND TRUSTEES—RAILROAD CO.—MORTGAGE.

Notice to a trustee is notice to the *cestui que trust*; and this rule applies to trustees under an ordinary mortgage made by a railroad company to secure the holders of bonds issued under it. (p. 259.)

*On account of illness.

4. NOTICE—PURCHASERS.

Where a subsequent purchaser has actual notice that the property in question was incumbered or affected, he is charged constructively with notice of all the facts and instruments, to the knowledge of which he would have been led by an inquiry into the incumbrance or other circumstance affecting the property, of which he had notice. (p. 259.)

5. MORTGAGE—RELEASE.

An entry of satisfaction by the mortgagee, after he has parted with his interest in the security, will not discharge the mortgage in favor of one who had acquired an interest in the land before the discharge was made. (p. 260.)

6. MORTGAGE—TRUSTS AND TRUSTEES—RELEASE.

A mortgage is executed by a railroad company on its property to secure bonds to be issued thereunder, which provides, that upon the full payment of all said bonds at maturity the trustee shall release the same. Before the maturity of the bonds, they are surrendered to the trustee upon an agreement, that other bonds to be issued under a subsequent mortgage are to be substituted for them. The trustee without substituting such other bond executed a release of the mortgage, stating therein that all the bonds "had been surrendered." The railroad company was not in a condition to anticipate the payment of its bonds, and had executed several other mortgages to take up bonds issued under former mortgages. *Held*: These facts and circumstances were sufficient to charge a subsequent mortgagee with notice of the terms and conditions, upon which the bonds under said released mortgage had been surrendered, and he takes subject to the rights of those entitled to the bonds under said agreement. (p. 260 *et seq.*)

7. TRUSTS AND TRUSTEES.

The trustee can only do with the trust-property what the deed either in express terms or by necessary implication authorizes him to do. (pp. 264, 5.)

8. MORTGAGE—RELEASE—EVIDENCE—CANCELLATION.

The cancellation of a mortgage on the record is only *prima facie* evidence of its discharge, and the owner may prove that the cancellation was done by fraud, accident or mistake, and, if he does this, his rights will not be affected by the improper cancellation of it. (p. 266.)

9. MORTGAGE—RAILROAD CO.—INTERVENTION—CH'Y PRACTICE.

Where the road of a railroad company passes into two states, in each of which it is a domestic corporation, and the trustee in a mortgage upon the whole road first brings a suit in one state to foreclose the mortgage and afterwards brings an ancillary suit in the other state for the same purpose, the plaintiff in said suits can not object to or prevent a lien-creditor of the railroad company, who has not filed his claim in the first suit, from intervening in the second to establish his lien. (p. 271.)

McDonald & Moore and *D. B. Lucas* for appellants.

W. H. Travers, *W. J. Robertson*, *J. C. Bullett*, *G. B. Caldwell* and *F. P. Clark* for appellees.

SNYDER, PRESIDENT:

Appeals from two decrees of the Circuit Court of Jefferson county,—one pronounced November 29, 1887, in the suit of *J. Garland Hurst*, administrator of *H. H. Crumlish*, deceased, suing on behalf of himself and all other stockholders of the Central Improvement Company, against the Shenandoah Valley Railroad Company; and the other pronounced September 11, 1888, in the suit of the Fidelity Insurance, Trust & Safe-Deposit Company, trustee, against the said Shenandoah Valley Railroad Company. As the record is voluminous and the facts complicated, an understanding of the questions to be determined may be facilitated by first giving a brief statement of some of the prominent facts appearing in the record.

The Shenandoah Valley Railroad Company was organized in May, 1870, under Acts of the Legislatures of the States of Virginia, West Virginia and Maryland for the purpose of constructing and operating a railroad; and the road, as constructed by it, now extends from Hagerstown in the state of Maryland through Jefferson county in West Virginia to the city of Roanoke in the State of Virginia. The Central Improvement Company was organized in July, 1870, under an Act of the Legislature of the State of Pennsylvania passed April 9, 1870, for the purpose of constructing any work public or private and for other purposes. Three written contracts were entered into between the said improvement and railroad companies, designated as contracts Nos. 1, 2, and 3.

No 1, dated August 9, 1870, was for the construction of the railroad by said improvement company from Sheperdstown to Big Lick (now Roanoke city) a distance of 233 miles, the work to be completed by August 10, 1872, at the price of \$35,000.00 per mile of track laid, payable in first and second mortgage-bonds of the said railroad company and certain county-bonds, as the work progressed.

No. 2, dated August 1, 1872, was practically a substitute for No. 1, and provided for the construction of the railroad

from Shepherdstown to Waynesboro, a distance of only 140 miles, and fixed October 1, 1874, as the time for the completion of the work.

No. 3, dated April 23, 1873, was supplemental to contract No. 2 and conferred upon the improvement company the power to vote a large amount of the stock of said railroad company.

On October 15, 1872, the said railroad company executed to J. Edgar Thompson, trustee, a first-mortgage on its road and franchises between Shepherdstown and Waynesboro, to secure \$3,750,000.00 of first-mortgage 7 *per cent.* gold bonds, being \$25,000.00 per mile of the road. During the month of September, 1873, \$781,000.00 of these bonds were issued and delivered to said improvement company on account of its contracts for the construction of said railroad; and of these bonds \$250,000.00 were subsequently delivered by the improvement company to the Pennsylvania Railroad Company as collateral security for loans made by the latter to the improvement company, leaving in the hands of the improvement company the balance of \$531,000.00 of said bonds. On January 7, 1873, a resolution was passed by the stockholders of the improvement company authorizing its president and treasurer to dispose of the securities receivable under its contract with the said railroad company. Work on the railroad was abandoned by the improvement company in the fall of 1873, and never afterwards resumed by it.

Jefferson county on behalf of itself and other stockholders of the Shenandoah Valley Railroad Company in April, 1874, filed its bill in the Circuit Court of Clarke county, Va., to set aside the aforesaid contracts, Nos. 1, 2, and 3, between the said railroad company and the improvement company. A final decree was entered in this suit on December 8, 1874, whereby said contracts Nos. 2 and 3 were set aside and declared void; but the court refused to set aside contract No. 1.

In December, 1876, an attachment suit in equity was brought in the Circuit Court of Warren county Va., by J. T. Griffith suing in the name of H. H. Crumlish for his use against the Central Improvement Company and the Shenandoah Valley Railroad Company to attach, whatever stock might be held by the improvement company in the said rail-

road company, and any indebtedness due from the latter to the former, to satisfy a debt due to the plaintiff from the said improvement company on account of work done for the latter in the construction of said railroad. The suit was afterwards transferred to the Circuit Court of Clarke county and referred to a commissioner, who made a report holding, that the \$781,000.00 of bonds aforesaid had been delivered by the railroad company to the improvement company under the said contracts Nos. 2 and 3, which had been set aside and declared void in the aforesaid Jefferson county suit, and that the said delivery was void. In December, 1878, an amended bill was filed by Griffith, in which he averred, that the said bonds had been delivered under said contract No. 2, which had been declared void, and consequently the said delivery was without authority and void, and the debt, which these bonds had been transferred to pay, was still a subsisting debt due from the said railroad company to the improvement company, and liable to the plaintiff's attachment. In January, 1880, Griffith on behalf of himself and the other creditors of the improvement company, who had by petition made themselves plaintiffs, filed a petition in the suit, in which it is averred "that all these bonds thus issued (\$781,000.00) have been returned and cancelled, and the mortgage securing them has been released, and they have been substituted by a like number of bonds issued under a second mortgage, recorded, for \$15,000.00 per mile."

On May 18, 1880, the court entered a decree in favor of the plaintiff, Griffith, against the Central Improvement Company for \$8,826.33, and ordered the sale of 5,000 shares of stock of the Shenandoah Valley Railroad Company, held by the improvement company, at the time the attachment was sued out by Griffith, to pay said sum; and the court being of opinion, that the improvement company had subject to the lien of the attachment of Griffith and before the filing of the petition and amended bill making the general creditors parties made a valid assignment of the said stock to the Pennsylvania Railroad Company, it denied the relief prayed for by the general creditors, and the amended bill, so far as it asked relief in their behalf, was dismissed.

From this decree and other decrees subsequently rendered

in other suits heard with this suit an appeal was taken to the Supreme Court of Appeals of Virginia; and the said decree of May 18, 1880, was affirmed. *Railroad Co. v. Griffith*, 76 Va. 913.

By an agreement dated April 29, 1878, the said improvement company agreed to surrender to the said railroad company all the first-mortgage bonds held by it upon the terms set forth in said agreement. On January 1, 1879, the said railroad company executed a mortgage on its railroad and franchises to the Farmers' Loan & Trust Company to secure \$2,250,000.00 of first-mortgage bonds. On August 25, 1879, W. H. Travers, as substituted trustee in the aforesaid mortgage of October 15, 1872, executed a release of said mortgage. The railroad company by a mortgage dated July 1, 1871, but which was in fact executed in September, 1879, and recorded October 6, 1879, conveyed its road and franchises to W. H. Travers, trustee, to secure \$1,500,000.00 of second-mortgage bonds; being \$10,000.00 per mile on its road from Shepherdstown to Waynesboro. The aforesaid mortgages of July 1, 1871 (1879) and of January 1, 1879, were subsequently released, the former May 6, 1880, and the latter on October 2, 1880. On April 1, 1880, the railroad company executed a mortgage to the plaintiff, The Fidelity Insurance, Trust & Safe-Deposit Company, trustee, on all its property to secure first-mortgage bonds to be issued at the rate of \$15,000.00 per mile of completed road, and \$10,000.00 of bonds additional for each mile of double track. On the next day, April 2, 1880, the said railroad company executed to the same trustee on all its property another mortgage to secure second-mortgage bonds at the rate of \$10,000.00 per mile of its road. On April 5, 1881, the said railroad company executed to same trustee another mortgage, known as the "General Mortgage," to secure bonds to be issued at a rate not exceeding \$25,000.00 per mile of its road. By deed of release, dated July 30, 1881, The Fidelity Insurance, Trust & Safe-Deposit Company released the aforesaid mortgage of April 2, 1880. The railroad company on February 12, 1883, executed another mortgage, known as the "Income Mortgage," on all its property and the income of its road to the defendant The Fidelity Insurance,

Trust & Safe-Deposit Company, trustee, to secure \$2,500,000.00 of income bonds. It will be observed, that of the aforesaid seven mortgages all have been released except the three dated, respectively April 1, 1880, April 5, 1881, and February 12, 1883, to The Fidelity Insurance, Trust & Safe-Deposit Company, trustee.

On December 1, 1882, the administrator of H. H. Crumlish, deceased, brought the first of these suits in the Circuit Court of Jefferson county. The bill alleges that the plaintiff, as administrator of Crumlish, was the owner and holder of two certificates of the paid-up stock of the Central Improvement Company of 100 shares each, of the par value of \$50.00 per share; that the paid up capital stock of said company was \$150,000.00; that the said company owes debts amounting to about \$300,000 00; that in a settlement made in the spring of 1874 it became the owner of \$781,000.00 of first-mortgage-bonds of the Shenandoah Valley Railroad Company, and is still the owner of \$531,000.00 of said bonds; that in the spring of 1879 these bonds without the authority of said company were destroyed, with the understanding, that they were to be substituted by other bonds to be issued under another mortgage; and, in order to prevent the issue and delivery of said substituted bonds to some unauthorized person, the plaintiff prayed an injunction to inhibit such issue, *etc.* A demurrer to this bill was sustained by the Circuit Court.

An amended bill was filed in April, 1885, in which the plaintiff avers, that since the filing of his original bill he has learned, that the Shenandoah Valley Railroad Company sets up a claim to said \$531,000 00 of bonds under an alleged agreement dated April 29, 1878, which is fraudulent and void; and that the mortgage of October 15, 1872, securing said bonds has been improperly released, setting out the facts and grounds, upon which the agreement is alleged to be void and the said mortgage improperly released, and then praying that said agreement and release may be declared ineffectual and void, and the title of said improvement company to said bonds established *etc.* A demurrer to this bill was also sustained by the Circuit Court; but on appeal to

this Court the demurrer was overruled the bill sustained and the cause remanded. *Crumlish v. Railroad Co.*, 28 W. Va. 623.

By a decree entered in the cause by the Circuit Court on November 29, 1887, it was decided, that the aforesaid agreement of April 29, 1878, did not pass the title to said \$531,000.00 of first mortgage-bonds from the improvement company to the Shenandoah Valley Railroad Company; that the amount of the debt evidenced by said bonds is still due from said railroad company to said improvement company; and adjudged and decreed, that said agreement of April 29, 1878, be declared void as between the said companies; and A. W. MacDonald was appointed receiver of the assets of the said improvement company, and leave given him to prosecute the claim of said company in the suit of The Fidelity Insurance, Trust & Safe-Deposit Company then pending in said court. From this decree the Shenandoah Valley Railroad Company has appealed.

The Fidelity Insurance, Trust & Safe-Deposit Company, trustee, on March 31, 1885, filed its bill against the Shenandoah Valley Railroad Company in the Circuit Court of the city of Roanoke in the state of Virginia, to foreclose the mortgages held by it as aforesaid; and on April 1, 1885, the said Fidelity Company, as trustee, filed its bill in the second of these suits, in the Circuit Court of Jefferson county, as ancillary to the foreclosure suit already brought in Roanoke city, as aforesaid; and Sidney F. Taylor was appointed receiver of said railroad and its property in each of said suits. In February, 1888, A. W. MacDonald, special receiver, filed his petition in this cause exhibiting therewith the record of the aforesaid suit of Crumlish's administrator against the Shenandoah Valley Railroad Company, averring that he was a necessary party to this suit by reason of the aforesaid decree of November 29, 1887, in the said Crumlish suit, appointing him receiver to prosecute the claim therein established in favor of the Central Improvement Company against the Shenandoah Valley Railroad Company, which he represented to be the first lien on the property of said company. The said Fidelity Company excepted to the filing of said petition and demurred to the same, and, said excep-

tions and demurrer having been overruled by the court, it filed its answer to said petition, and to the bill and amended bill in said Crumlish suit.

As defences in its answer it denied the right of petitioner to exhibit the record in the Crumlish suit against it in this suit, because it was not a party to that suit; it denied the right of petitioner to intervene in this suit, because it is only an ancillary proceeding to the main suit, which was then pending in the Circuit Court of the city of Roanoke, and insisted, that the improvement company should assert its claim in that suit; it claimed that on a settlement of accounts the improvement company would be shown to be indebted to the Shenandoah Valley Railroad Company; it pleaded and relied on the said agreement of April 29, 1878, as a valid and binding contract between the improvement company and said railroad company; and it also pleaded and relied on the laches of said improvement company as a bar and estoppel to its right to set up its alleged claim in this suit.

The petitioner replied generally to this answer. The administrator of Crumlish having also filed his petition in this cause, he was also made a party, and the Fidelity company made substantially the same objections and answer thereto.

On September 11, 1888, the Circuit Court pronounced a decree, by which it was adjudged and decided, that as between the stockholders and creditors of the Central Improvement Company and the Fidelity Insurance, Trust & Safe-Deposit Company, trustee, representing the holders of the bonds issued under the said mortgages dated respectively April 1, 1880, April 5, 1881, and February 12, 1883, the said The Fidelity Company was and is a purchaser for value without notice, and postponed the payment of the debt of said improvement company to the liens created by said mortgages.

From this decree J. Garland Hurst, administrator of H. H. Crumlish, deceased, and A. W. MacDonald, special receiver for the Central Improvement Company, have appealed.

The first inquiry is whether or not the Circuit Court erred in the decree entered by it on November 29, 1887, in the first

of these causes. It is contended by the appellant, the Shenandoah Valley Railroad Company, as well as by the Fidelity Company, that inasmuch as the contracts, Nos. 2 and 3, under which the first-mortgage-bonds claimed by the Improvement Company were delivered or paid to it by the Shenandoah Valley Railroad Company, were set aside and declared void by the decree of December 8, 1874, of the Circuit Court of Clarke county in the suit of Jefferson county against said Improvement Company, the said company never had any right or title to said bonds.

In the view I take of this cause, it is unnecessary to consider any matter connected with said Jefferson county suit. The record shows that at a meeting of the stockholders of the Central Improvement Company held on January 2, 1873, the following resolution was adopted: "Resolved, that the president and treasurer of this company are hereby authorized and empowered to dispose of the securities receivable by this company under its contract with the Shen. Val. R. Co., on such terms as in their judgment may be to the best interests of this company." So far as the minutes of this company show, its stockholders had but three meetings, after this resolution had been passed, and the last of these was held November 4, 1875. At neither of these meetings was the authority conferred by the aforesaid resolution revoked or withdrawn. The records of the improvement company show, that on April 29, 1878, and prior thereto Phillip Collins was the duly-elected and acting president of said company, and C. W. MacKeehan was secretary and treasurer. On said day the following agreement was executed:

"This agreement, made this 29th day of April, A. D. 1878, between the Shenandoah Valley Railroad Company, of the first part, and the Central Improvement Company, of the second part, witnesseth: Whereas, under certain contracts heretofore made with the Shenandoah Valley Railroad Company, the Central Improvement Company agreed to build the said Shenandoah Valley Railroad from Shepherds-town, on the Potomac river, in the state of West Virginia, to a point of connection with the Chesapeake and Ohio Railroad near Staunton, Va., being a distance of about one hundred and thirty three miles; and whereas, under said con-

tracts, a large amount of grading and masonry has been done on the first seventy five miles of the line south of Shepherdstown; and whereas, by reason of the financial panic of 1873, the further construction of said road had ceased up to this time, and it is now the desire of the Shen. Val. R. R. Co. and the Central Improvement Company that the bonds and other securities of the Shenandoah Valley R. R. Co., heretofore paid to the Central Improvement Company, and by it pledged to other parties, shall be retired and canceled, in order that under a new contract with John Satterlee & Co. and Alfred Creveling and the Shenandoah Valley Railroad Company may be carried out for the completion of said road to a connection with the Chesapeake and Ohio Railroad, and in order that the said Central Improvement Company be released from all liability under the contracts above mentioned: Now, therefore, this agreement witnesseth: *First.* That the securities heretofore deposited with the Pennsylvania Railroad Company for the amount advanced to the Central Improvement Company by the Pennsylvania Railroad Company shall be surrendered by said Pennsylvania Railroad Company to said Shenandoah Valley Railroad Company; the Pennsylvania Railroad Company agreeing to receive in exchange therefor, under the terms of an agreement already made between said companies, \$250,000.00, of an issue of \$500,000.00 six *per cent.* currency second-mortgage bonds of the Shenandoah Valley Railroad Company, subject to a prior lien of \$15,000.00 per mile of first-mortgage six *per cent.* bonds which second-mortgage bonds the said Shenandoah Valley Railroad Company agrees to deliver to the said Pennsylvania Railroad Company, under the terms of the agreement herein referred to. *Second.* The Central Improvement Company agrees to deliver to the Shenandoah Valley Railroad Company all the first-mortgage bonds of the Shenandoah Valley Railroad Company held by it which were received under the contracts aforesaid. *Third.* The Shenandoah Valley Railroad Company also agrees to issue and deliver to the Central Improvement Company \$250,000.00 of these second-mortgage-bond aforesaid, in full consideration for the delivery and cancellation of the securities referred to. *Fourth.* The Shenandoah Valley Railroad Company also agrees to issue and

deliver to the Central Improvement Company, in payment for the amount received by it from subscribers to its capital stock heretofore expended by said Central Improvement Company in the gradation of the line above mentioned, the amount paid in on the capital stock of the Central Improvement Company, with interest amounting to the sum of —, six *per cent.* currency income bonds of said Shenandoah Valley Railroad; said bonds to be taken at the rate of fifty cents on the dollar, to be subject only to the first and second mortgage-bonds herein mentioned. Should the Central Improvement Company, or any of the holders of the above-mentioned income bonds paid out under the terms of this contract, elect to have said bonds converted into preferred stock of the Shenandoah Valley Railroad Company, then the Shenandoah Valley Railroad Company agrees to issue said preferred stock upon the written request of the said Central Improvement Company or the holders thereof. *Fifth.* The Shenandoah Valley Railroad Company agrees to release the Central Improvement Company from all damages arising from breach of the contract above-mentioned, and consents that the same shall be declared null and void. *Sixth.* The Central Improvement Company hereby gives its full consent to the delivery by the Pennsylvania Railroad Company, and all other holders of securities herein mentioned, to the Shenandoah Valley Railroad Company, of the securities hereinbefore referred to, and held by the Pennsylvania Railroad Company and others as collateral for advances made from time to time to said Central Improvement Company.

“In witness whereof the parties of the first and second part hereunto have affixed their seals, duly attested, day and year above written.

WILLIAM MILNES, Jr.,

“Pres. Shen. Val. R. R. Co.

[Seal of Shenandoah Valley Railroad Co.]

“PHILLIP COLLINS,

“Pres. Central Improvement Co.

[Seal of Central Improvement Co.]

“Attest : C. W. MACKEEHAN, Secretary Central Improvement Company.”

It is proven by C. W. MacKeehan, whose name is signed to said agreement, that Phillip Collins was at the time the president, and that he, MacKeehan, was the secretary and treasurer, and that he and Collins signed and affixed the seal of the company to said agreement for the purpose of executing it; that they fully understood the facts, and regarded the agreement as very satisfactory and beneficial to the improvement company,—to use his language, they thought “that it was a god-send to the improvement company.” The records of the company do not show any other express authority to execute this agreement than the aforesaid resolution of January 7, 1873; nor is there any other evidence on the subject. The Shenandoah Valley Railroad Company and The Fidelity Company not only concede, that this agreement was properly and legally executed, but insist, that it is valid and binding upon both the Shenandoah Valley Railroad Company and the improvement company. The only question then is, whether or not the improvement company is bound by this agreement.

It is claimed on behalf of this company, that the aforesaid resolution authorized the president and treasurer to act for it; while this agreement is executed by the president and attested by the secretary, and therefore it is not only not an exercise of the power conferred by the resolution, but it does not purport to be so, and in fact the officers, who executed it, did not intend to act under that resolution. It is proven, that MacKeehan, at the time he executed the agreement, was both secretary and treasurer of the company, and that he did execute it as an officer of the company. In the face of this proof it is immaterial in what form he executed it. It would be extremely technical and, I think, unwarrantable to hold, that a paper duly signed and sealed by the proper officer should be held invalid, simply because he failed to properly add to his signature the proper title of his office, and especially when as in this case the officer held the two offices in the same company. Nor does it seem to me at all material, that the agreement does not refer to the resolution, or that the officers did not intend to execute it under said resolution. The question is not what the officers believed or intended at the time, but what they did, and whether they acted within

the authority conferred upon them, and these questions must be determined solely and entirely by the act or agreement itself.

The rule is well settled: "If a contract purport to be sealed with the seal of a corporation, and it is proven to be signed and executed by the proper agents, the presumption is, that the seal was regularly affixed by the proper authority; and a contract under seal executed by an agent within the scope of his appointed power will be held valid and binding upon the corporation, until evidence to the contrary has been introduced." Ang. & A. Corp. § 224; 2 Mor. Priv. Corp. § 617; *Smith v. Smith*, 62 Ill. 493, 497. "The presumption of authority to affix to the instrument the seal of the corporation will not be overcome by the mere fact, that no vote of the directors authorizing it is shown, since it is often the case, that large powers are executed by corporate officers with the tacit approval of the corporation." 1 Wat. Corp. § 96; *Railroad Co. v. Bastian*, 15 Md. 494.

It appears in proof, that the stockholders of the improvement company had notice of this agreement as early as July, 1879, and that they acquiesced in it until the filing of the amended bill in this cause in April, 1885. It is true, the plaintiff in this suit avers in his bill, that he did not know, that said agreement had not been properly executed and honestly carried into effect until after he had filed his original bill in December, 1882; but this did not relieve him from the responsibility of acquiescence in said agreement. He had notice of the existence of this agreement and the means of determining its validity, and it was his duty to do so. It is therefore plain under the authorities above cited, that, even if said agreement was executed without express authority from the stockholders or directors of the company, the plaintiff in this suit as well as the improvement company is estopped to question or deny the authority to execute it. *Trader v. Jarvis*, 23 W. Va. 108; *Field, Corp.* § 226; *Story, Ag.* § 255.

This agreement fully explains the condition of the improvement company and the circumstances, under which it was made; and considering these circumstances it seems to me, that it was not only just but liberal in its provisions in

favor of the improvement company. Its operative provisions deal with two subjects: *First*, the \$250,000.00 of bonds, which had been placed with the Pennsylvania Railroad Company as collateral security; and, *second*, the \$531,000.00 of bonds, which still belonged to the improvement company. In respect to the latter the improvement company agreed to deliver to the Shenandoah Valley Railroad Company said \$531,000.00 of bonds, and the railroad company agrees in consideration thereof to issue and deliver to the improvement company \$250,000.00 of second mortgage bonds, out of a total issue of \$500,000.00 subject to a first-mortgage of \$15,000.00 per mile, and also to issue and deliver to the improvement company income-bonds at the rate of fifty cents on the dollar to an amount equal to the paid-up capital stock of said improvement company, subject to the lien of the aforesaid first and second mortgages, and also to release the improvement company from all damages arising from the breach of the contract, on account of which said \$781,000.00 had been delivered to it.

This is the whole purport and effect of said agreement, so far as it relates to said \$781,000.00 of bonds. Therefore, whatever may be the fate of the aforesaid contracts, Nos. 1, 2, and 3, and the defects in the title to the bonds originally delivered under the same, there can be no question in regard to the title of the improvement company as to the bonds, which the railroad company bound itself to deliver to said company under the said agreement of April 29, 1878, provided the latter agreement is valid and enforceable. That it is a valid agreement, I think for the reasons and upon the authorities hereinbefore given, there can be no question. But the improvement company contends, that said agreement was executory, and that the railroad company has not only wholly failed to perform it, but that by its subsequent acts and conveyances it has entirely disabled itself to perform it or carry it into execution. Admitting that said agreement is executory, it does not necessarily follow, that it would be inoperative, or that the railroad company by its subsequent acts has disabled itself to perform it or respond in damages for its failure to do so. A simple judgment against the railroad company for damages would probably be worthless and

could not perhaps be considered as a sufficient remedy for its failure to perform said agreement.

The real question presented therefore, it seems to me, is whether or not the railroad company has so disabled itself or changed its condition, that on account of the intervening rights of others there can be neither a specific execution of said agreement in equity nor substantial compensation compelled for the failure to perform it; and the solution of this question depends upon, whether or not the Fidelity Company as trustee in the three subsisting mortgages executed to it by the railroad company is a purchaser for value without notice of the claim or rights of the improvement company. We shall therefore proceed to consider that question.

It is a well-settled principle of law, and especially in this State and in Virginia, that notice to a trustee is notice to his *cestui que trust*. *Beverly v. Brooke*, 2 Leigh, 446; *French v. Loyal Co.*, 5 Leigh, 641; *Le Neve v. Le Neve*, 2 Lead. Cas. Eq. 132, 145. In these states a trustee is always treated as a purchaser for value. *Wickham v. Lewis*, 13 Gratt. 430; *Manufacturing Co. v. Coal Co.*, 8 W. Va. 409. "Notice to trustees under an ordinary mortgage-deed of a railroad company is notice to the holders of the bonds secured by the mortgage. Such trustees are considered in the light of agents for the negotiating of the loan. They act for those who lend their money on the security of the mortgage. They are charged with the duty of protecting the interests of the bondholders, who are unconnected individuals, having no ready means of acting together except through trustees, whom the law appoints to act for them. Notice to the trustees is held to affect the title in their hands with reference to incumbrances upon the trust-property. Actual notice to the trustees of a prior equitable mortgage is notice of it to the bondholders, who therefore take their bonds subject to the legal consequences of the incumbrance." *Jones*, Ry. Sec. § 363; *Pierce v. Emery*, 32 N. H. 484, 521; *Miller v. Railroad Co.*, 36 Vt. 452.

Whatever is sufficient to put a person on inquiry is considered as conveying notice; for the law imputes a personal knowledge of a fact, of which the exercise of common prudence might have apprised him. When a subsequent

purchaser has actual notice, that the property in question is incumbered or affected, he is charged constructively with notice of all the facts and instruments, to the knowledge of which he would have been led by an inquiry into the incumbrance or other circumstance affecting the property of which he had notice. 2 Minor, Inst. 889; 2 Bart. Ch. Pr. 1006; *Booth v. Barnum*, 9 Conn. 286.

The first mortgage executed to the Fidelity Company is dated April 1, 1880, and was recorded on April 7, 1880. At the latter date the records of Jefferson county showed the following facts in respect to the Shenandoah Valley Railroad property: (1) The mortgage to J. Edgar Thompson, trustee, dated October 15, 1872; (2) the mortgage to the Farmers' Loan & Trust Company, trustee, dated January 1, 1879; (3) the deed releasing the aforesaid mortgage to J. Edgar Thompson executed by W. H. Travers, substituted trustee, and dated August 25, 1879; and (4) the mortgage to W. H. Travers, trustee, dated July 1, 1871, but not delivered until September, 1879. At the time the mortgage of January 1, 1879, to the Farmers' Loan & Trust Company was executed and recorded, the mortgage of October 15, 1872, had not been released, and as a legal consequence the Farmers' Loan & Trust Company held subject to the lien of said mortgage; for it is a well-recognized and sound principle of law, that an entry of satisfaction by the mortgagee, after he has parted with his interest in the security, will not discharge the mortgage in favor of one who had acquired an interest in the land before the discharge was made. Such person is no worse off, than he supposed himself to be, when he acquired his interest; and there is no reason in equity, why the person really entitled to the mortgage should not have the benefit of it, so far as he is concerned. 2 Jones, Mort. § 957, and cases cited.

But this is not all. The said mortgage of January 1, 1879, contains the following provision: "Resolved, that it is the judgment of the president and directors of the Shenandoah Valley Railroad Company, that the bonds authorized and directed to be issued on the 12th day of October, 1872, * * * be reduced to the sum of \$2,250,000.00, * * * and that said bonds be secured by a first mortgage, * * * to

be executed and delivered to the Farmers' Loan & Trust Company." Thus we have an express declaration upon the face of this mortgage, that the bonds to be issued under it are to take up and secure the bonds, which had been issued under the said mortgage of October 15, 1872. The recordation of this mortgage was notice of this fact not only to the Farmers' Loan & Trust Company, the trustee therein, but to W. H. Travers, trustee in the deed of September, 1879, and the Fidelity Company, as trustee in the subsequent mortgages on the same property. *Tysen v. Railroad Co.*, 13 Amr. & Eng. R. Cas. 134, and cases cited in note, p. 138.

In the mortgage to W. H. Travers, trustee, dated July 1, 1871, but not delivered until September, 1879, is the following recital: "And be it further resolved, that the following indorsement, to be signed by the president and secretary, be made upon the bonds: 'This bond, and the mortgage to secure the payment of the same, although dated the first day of July, 1871, were not actually delivered until after the making and issuing of a series of bonds of the Shenandoah Valley Railroad Company, amounting to \$2,250,000.00, dated Jan. 1, 1879, and secured by a first mortgage upon the property and franchises of the Shenandoah Valley Railroad Company, of even date therewith, and duly recorded, which bonds and mortgage of Jan. 1st, 1879, were issued in substitution of the bonds and mortgage dated Oct. 15, 1872; and the mortgage to secure the payment of this bond is subject to the said first mortgage on Jan. 1, 1879.'" This recital of record as a part of this mortgage was notice not only to W. H. Travers, the trustee therein, but to the Fidelity Company and all other subsequent mortgagees or purchasers, that both this mortgage and the aforesaid mortgage of January 1, 1879, were made subject to and in part for the purpose of taking up the bonds issued under the prior mortgages of October 15, 1872, by the substitution of the bonds to be issued under it for the bonds secured by said mortgage of October 15, 1872.

The mortgage of April 1, 1880, executed to the appellee, the Fidelity Company, as trustee, contains the following recital: "And it is further resolved, that the board of directors be, and they are hereby, fully authorized and empow-

ered to negotiate with, and make such contracts or agreements with, the bondholders secured under the said mortgage of January 1, 1879, and the trustees thereof, with the bondholders secured under the second mortgage of July 1, 1871, and the trustee thereof, and with the holders of the different bonds, and with other creditors of and claimants against the company, or with either or any of them, upon such terms and conditions as the board of directors may deem proper, for the purpose of retiring and cancelling the bonds issued under the said mortgages, and obtaining a satisfaction and release of said mortgages, and retiring and cancelling the different bonds and other indebtedness of the company, or for any of these purposes, and to make, execute, and deliver such instrument or instruments in writing, as may be deemed expedient to effect these or any of these purposes. And it is further resolved, that for the purpose of retiring and cancelling the bonds issued under the security of the second mortgage, dated July 1, 1871, and obtaining a satisfaction and release of the same for the purpose of retiring any other bonds now issued and outstanding, and to settle other indebtedness of the company, or for any of these purposes, if in the opinion of the board of directors it should be deemed advisable so to do, and for the purpose of enabling the company to increase the facilities for a speedy completion of the road, and effecting the purpose of its incorporation, the board of directors are fully authorized and empowered, and have and hereby are given the consent of the stockholders of this company to create, issue and negotiate the certificates of loans or bonds of this company, coupon or otherwise. * * * And provided, further, that the first bonds issued under this resolution shall be used by the trustees for the purpose of exchanging the same with and canceling the bonds issued, and which may hereafter be issued, under the said first-mortgage of Jan. 1, 1879, to the Farmers' Loan & Trust Company of New York."

These recitals declare distinctly, not only that the bonds to be issued under this mortgage are, so far as may be necessary for the purpose, to be substituted for and used to cancel and retire the bonds theretofore issued under the said mortgages of January 1, 1879, and July 1, 1871, (September, 1879,) but

“for the purpose of retiring any other bonds now issued and outstanding, and to settle other indebtedness of the company;” and “that the *first bonds issued* under this resolution (mortgage) shall be used *by the trustees* for the purpose of *exchanging* the same with and *cancelling* the bonds issued and *which may hereafter be issued* under the said mortgage of Jan. 1, 1879.” This deed was recorded on April 7, 1880, while the deed releasing the aforesaid mortgage of January 1, 1879, was not recorded until November 24, 1880, more than seven months thereafter. This fact makes the above italicised words, “which may hereafter be issued,” significant, because the mortgage of January 1, 1879, to which those words refer, expressly provided, that the bonds to be issued under it were to be used to reduce and secure the bonds issued under the mortgage of October 15, 1872. It is hardly possible, that, at the time when the mortgage of April 1, 1880, was executed, it was contemplated, that any bonds would be thereafter issued under the mortgage of January 1, 1879, for the loan of money or to be sold on the market; but it is very probable, as the holders of the bonds under the mortgage of October 15, 1872, were entitled to have their bonds exchanged for bonds to be issued under the said mortgage of January 1, 1879, that it was contemplated by the parties to the mortgage of April 1, 1880, that bonds might be thereafter issued under the mortgage of January 1, 1879, in exchange for bonds issued under the mortgage of October 15, 1872, and it was these bonds, so thereafter issued in exchange, that the trustees in the deed of April 1, 1880, were to take up. This fact and purpose appearing upon the face of the mortgage to the Fidelity Company was of course notice to it.

It therefore seems clear, that the Fidelity Company is chargeable with notice, by the records, under which it claims title, that the holders of bonds issued under the said mortgage of October 15, 1872, have a prior lien on the railroad property in said mortgage mentioned, unless said lien had been either legally released or equitably barred, as against the rights of the Fidelity Company. I think it may be assumed as a legal proposition, which will not be controverted or denied, that, unless the deed of August 25, 1879, executed

by W. H. Travers as substituted trustee releasing the mortgage of October 15, 1872, operated to exempt the Fidelity Company from notice or any liability for the bonds issued under said mortgage, then the said company is not entitled to the position of a purchaser without notice as against the claim of the Central Improvement Company.

The said mortgage of October 15, 1872, provided, that in the event of the death of the trustee therein named the grantor should have the authority to appoint his successor. It seems to me therefore, that the substitution of W. H. Travers as trustee therein for J. Edgar Thompson, deceased, was a legal exercise of that authority and conferred upon said Travers all the powers possessed by said Thompson as trustee therein. The only provision in the said mortgage of October 15, 1872, which can be construed into authority to the trustee to release the same under any conditions or circumstances, is that contained in the proviso declaring: "that if the party of the first part * * * shall and do well and truly pay or cause to be paid unto the person or persons, bodies politic or corporate, who shall become the holders of the bonds intended to be secured hereby, the several respective sums expressed therein, * * * according to the provisions of said bonds, * * * then, and from thenceforth, as well this present indenture * * * as the said recited obligations shall become void and of no effect, * * * and satisfaction shall be forthwith duly entered by the said trustee or trustees for the time being upon the record of this indenture of mortgage."

This proviso is a positive contract between the grantor, the trustee and the bondholders, and contains the only authority, upon which the trustee can release the mortgage. The manner of exercising this authority is limited by the contract to the simple entry of satisfaction by the trustee upon the record of the mortgage. But even if this power could be properly exercised by the execution of a deed of release, as was done in this instance, it could only be done upon the condition precedent prescribed in the contract or mortgage itself, that is, upon the payment of the bonds to the holders thereof; and any release or attempt to release the mortgage by the trustee, whatever may be its form, if ex-

cuted before the happening of or compliance with this condition, is absolutely null and void; and a subsequent purchaser must at his peril ascertain, whether or not this condition has been performed. 2 Minor, Inst. 209, 237; 2 Perry Trusts, § 783; *Jackson v. Ligon*, 3 Leigh, 161; *Raper v. Sanders*, 21 Gratt. 60. The trustee can only do with the trust-property what the deed either in express terms or by necessary implication authorizes him to do. *Seborn v. Beckwith*, 30 W. Va. 774, (5 S. E. Rep. 450;); *Mundy v. Vawter*, 3 Gratt. 518; *Heth v. Railroad Co.*, 4 Gratt. 482.

"When a recorded mortgage is discharged by a person other than the mortgagee, the person paying the money, and all subsequent purchasers as well, are bound to inquire what authority he had to discharge it, and are chargeable with notice of such facts as by proper inquiry might have been ascertained. * * * A mortgagee, with notice that a prior mortgage has been improperly discharged without being satisfied, still holds subject to that mortgage as much as if no discharge had been made. If, for instance, he has notice that the prior mortgage has been assigned as collateral security, and, the assignment not being recorded, the assignor enters satisfaction of it on record, this does not deprive the assignee of his priority of claim. The discharge, however, would bar all equitable rights of the assignor, and the assignee could recover only to the extent of his actual interest in the mortgage." 2 Jones, Mortg. § 957; *Swarthout v. Curtis*, 5 N. Y. 301.

The said deed of release of August 25, 1879, after reciting the provisions of the mortgage of October 15, 1872, and the fact, that the Shenandoah Valley Railroad Company had executed the mortgage of January 1, 1879, to the Farmers' Loan & Trust Company to secure \$2,250,000.00 of bonds, contains the following provision: "And whereas, there have been surrendered to the said party hereto of the first part, the trustee substituted as aforesaid, all of the bonds, as well those issued as those executed but not issued under and in pursuance of the terms of the said mortgage, bearing date Oct. 15, 1872, for cancellation; and whereas, the said trustee hath cancelled and destroyed all of the said bonds, numbering 3,750, each for \$1,000.00, amounting in all to the

sum of \$3,750,000.00, being the whole number and amount of bonds secured by the said mortgage deed dated Oct. 15, 1872, and hath cancelled also and destroyed all coupons attached to and detached from the said bonds, and that in any wise and at any time belonging to the said bonds: Now, in consideration of the premises, and of the payment of the sum of \$5.00 by the party of the second part to the party of the first part, the said William H. Travers, by virtue of the authority vested in him as substituted trustee, as aforesaid, by the said mortgage-deed, bearing date the 15th day of Oct., 1872, and in discharge of the trust therein reposed in the trustee named therein, and his successor or successors, doth grant, remise, release, surrender, assign and set over unto the Shenandoah Valley Railroad Company all the right, title, interest, property and estate granted and conveyed by the mortgage-deed bearing date as last mentioned, and recorded as aforesaid, and to which reference is hereby expressly made for a description of the same, to the intent that all the right, title, interest, property, and estate of the said Shenandoah Valley Railroad Company, granted as aforesaid, may be discharged from the said mortgage."

It will be observed that the words "surrendered," "cancelled," and "destroyed" are used in this provision of the deed; but it is nowhere stated therein, that the bonds secured in the mortgage of October 15, 1872, had been either paid or satisfied. It will also be noted, that it is not stated, by whom the bonds "had been surrendered,"—whether by the owners or holders or some unauthorized person. It becomes therefore important to inquire into the facts and circumstances, under which said bonds were "surrendered," because the cancellation of a mortgage on the record is only *prima facie* evidence of its discharge, and the owner may prove, that the cancellation was done by fraud, accident or mistake, and, if he does this, his rights under the mortgage will not be affected by the improper cancellation of it. *Heyder v. Association*, 42 N. J. Eq. 403, (8 Atl. Rep. 310); *Kenicott v. Supervisors*, 16 Wall. 469; *Harris v. Cook*, 28 N. J. 345. "A release executed by a trustee in a deed of trust without the authority of the *cestui que trust* and without having received payment of the debt secured does not discharge

the lien." 2 Jones, Mortg. § 957; *Lakenan v. Robards*, 9 Mo. App. 179.

The circumstances, under which the \$531,000.00 of bonds of the Central Improvement Company were "surrendered" and destroyed, appear by the record to be as follows: The office of the improvement company in the city of Philadelphia was kept in the office of the Pennsylvania Railroad Company. The said \$531,000.00 of bonds had been put in the safe of the improvement company in its office by J. P. Green, the then treasurer of the company. Green resigned and turned the bonds over to his successor, J. H. MacKeehan, who died, and was in the year 1877 succeeded as treasurer by his brother, C. W. MacKeehan, who held said office until after 1880. The bonds remained in said safe, and it seems that C. W. MacKeehan was never informed that they were there. After the aforesaid agreement of April 29, 1878, had been executed, and a duplicate copy thereof delivered to the railroad company, and only a few days after W. H. Travers had been made substituted trustee in the said mortgage of October 15, 1872, (the appointment of said Travers having been made on December 6, 1878,) the said Travers, accompanied by U. L. Boyce, the vice-president of the railroad company, went to the office in which said bonds were kept, where they found J. P. Green, a vice-president of the Pennsylvania Railroad Company, but who had no authority or control over the said bonds, took possession of the said \$531,000.00 of bonds, and destroyed them with all the other bonds issued under the said mortgage of October 15, 1872.

J. P. Green, in answer to the question, "Under what circumstances were these bonds destroyed?" deposes: "My understanding was, at the time, it was in pursuance of an arrangement between the Central Improvement Company and the Shenandoah Valley Railroad Company, by which all of the old first-mortgage bonds were to be destroyed, and new bonds take their place." And the said Travers, in reply to the same question, deposes: "I had known, that negotiations were going on between the Shenandoah Valley Railroad Company and the Central Improvement Company, to whom a portion of these bonds had been delivered, to relieve the road from the incumbrance of the mortgage of 15th of October,

1872, and I was advised of the fact, that those bonds had been surrendered to or were under the control of the Central Improvement Company and were ready for cancellation and destruction. Under that arrangement and being so advised I went to the office of the Central Improvement Company and the Pennsylvania Railroad Company and found the bonds there in the possession of Mr. Green. I examined them and found, that they were all there as described and called for in the deed of trust of October 15, 1872, together with all the coupons attached,—and some of them probably had been detached,—and they were destroyed in my presence and with my assistance.” Mr. Travers also testified that he was at the time a stockholder, director and general counsel for the railroad company.

It is impossible to assert or believe in the presence of these facts and others appearing in the record, that Mr. Travers did not take possession of and destroy said bonds of the improvement company under and upon the authority contained in the aforesaid agreement of April 29, 1878, and upon that authority alone. Any other conclusion would place Mr. Travers in the position of having destroyed them without any right whatever to do so; for there is not a particle of evidence, that he had any other authority. Having destroyed said bonds under the authority conferred by said agreement Mr. Travers of course knew its contents. By the terms of said agreement,—which the Fidelity Company admits and insists is a valid and binding contract,—the improvement company agreed to surrender and deliver to the railroad company the said \$531,000.00 of bonds in consideration of the issuing and delivery to it by the railroad company of certain second-mortgage and income-bonds therein specified. The surrender of the bonds held by the improvement company and the delivery of the bonds to be given in exchange therefor by the railroad company were to be dependent or concurrent acts. If they were not both performed at the same time, the performance of its part by either company imposed an immediate obligation on the other to perform its part. It therefore appears, that the railroad company by U. L. Boyce, its vice-president, and W. H. Travers, the substituted trustee in the mortgage of Octo-

ber 15, 1872, assumed the responsibility of performing and did perform for the improvement company its part of said agreement without its knowledge or assistance. Whatever might be said by the improvement company as to the propriety and good faith of this transaction, it is certain that neither the railroad company nor W. H. Travers, the trustee, can question or deny that it was, in effect, a full and complete performance on the part of the improvement company of its part of said agreement, and that it thereby became, *eo instanti*, entitled to the substituted bonds provided for therein. Of this fact both the railroad company and W. H. Travers were of necessity fully informed. It is thus apparent that the word "surrendered" was advisedly used in reference to these bonds by Mr. Travers in the deed of release of August 25, 1879.

We have now shown, that the "surrender" of said bonds was upon the authority of an agreement, and under circumstances, which made it the duty of the trustee to see, that the bonds due to the improvement company by virtue of said agreement were delivered to it, or at least to give notice to subsequent purchasers of the fact, that said company was entitled to said bonds. It must therefore be presumed, that, if he did not perform this duty by giving such notice to the Fidelity Company and the other subsequent purchasers, he certainly would have informed them of all the facts, if inquiry had been made of him. *Caylus v. Railroad Co.*, 10 Hun 295; *Acer v. Westcott*, 1 Lans. 193; 1 Story, Eq. Jur. § 399.

Was there anything upon the records or in the circumstances of the transaction, which made it the duty of the Fidelity Company as a subsequent purchaser to make this inquiry? As we have seen, the only condition, upon which the trustee was authorized to release the mortgage of October 15, 1872, was upon the true payment of all the bonds therein secured to the holders thereof. Now in the search, which the Fidelity Company was legally bound to make, when it read the mortgage and there found in the deed purporting to release that mortgage the word "surrender," instead of "payment" or "satisfaction," would it not have been an act required by the most ordinary prudence and dil-

igence for it to have gone to Mr. Travers, the trustee, who had used that word in executing the release, and have made of him the inquiries, by whom and under what circumstances were said bonds "surrendered?" In addition, the Fidelity Company knew from the records, through which it claims title, that the prior mortgages of January 1, 1879, and of September, 1879, had been executed to take up the bonds issued and outstanding under the mortgage of October 15, 1872, and that its mortgage of April 1, 1880, was in turn executed to take up the bonds then or thereafter issued under said mortgage of January 1, 1879. Wade, Notice, §§ 308, 309; *Taylor v. King*, 6 Munf. 358; *Briscoe v. Ashby*, 24 Gratt. 454; *Coles v. Withers*, 33 Gratt. 201. And, of necessity, it must also have known, that the Shenandoah Valley Railroad was at the time, if not insolvent, not plethoric with money to pay off its bonds before maturity, and that it was not likely, that the holders would gratuitously surrender their first mortgage bonds to the company or its trustee and especially so, in the face of the fact, that the company was then using its utmost efforts to borrow money, and shingling over its property with new mortgages for that purpose.

It seems to me, that, if these facts and circumstances were not sufficient to excite diligence and invoke inquiry from the most careless, then nothing in reason could be expected to do so. "A party willfully closing his eyes against the lights, to which his attention has been directed, and which, if followed, would lead to a knowledge of all the facts, is chargeable with notice of every fact, that he could have obtained by the exercise of reasonable diligence. * * * The limit of inquiry necessary in any case is that required by the use of reasonable diligence. What is reasonable diligence can not be determined by any general rule, but must vary with the circumstances of each case." 1 Jones, Mortg. § 596. The circumstances in this cause it seems to me, are entirely sufficient to have put the Fidelity Company on inquiry as to the terms and conditions and by whom the bonds of the improvement company were surrendered; and if the company had made this inquiry of the trustee, W. H. Travers, it would have been informed, that they had been taken possession of by him, and destroyed, under the said agreement of April

29, 1878, and this agreement would have given it notice of the equitable lien of said company. *Burwell v. Fauber*, 21 Gratt. 463; *Long v. Weller*, 29 Gratt. 353; *Watts v. Kinney*, 3 Leigh, 293, 296; *Association v. Thompson*, 31 N. J. Eq. 536; *Swarthout v. Curtis*, 5 N. Y. 301, 309; *Claylin v. Railroad Co.*, 8 Fed. Rep. 118; *Brush v. Ware*, 15 Pet. 93; *Roberts v. Halstead*, 9 Pa. St. 32.

I am therefore of opinion that the Fidelity Company is not a purchaser without notice as to the said equitable lien of the improvement company.

Having reached this conclusion, it is apparent there is no foundation for the contention of the improvement company, that the railroad company has disabled itself by subsequent mortgages from performing its part of the said agreement of April 29, 1878. All these mortgages are subordinate to the claim of the improvement company under said agreement; and said claim may be enforced not only against the railroad company but also against those claiming under said mortgages. I think it better to abstain at this time from indicating the manner, in which this equitable lien of the improvement company ought to be enforced, or the specific form of the relief to be granted in that behalf under the peculiar circumstances of this cause, for the reason that none of these matters were considered or passed upon by the Circuit Court; nor were they discussed by counsel in the argument before this court. From what has already been said, and from the facts appearing in the record, it is not apprehended there can be any serious difficulty in settling these questions.

It seems to me, the objections made by the Fidelity Company to the right of the improvement company to intervene in this cause are not well taken. While it is true, the decision in *Muller v. Dows*, 94 U. S. 444, and other cases hold, that the railroad property in this State could have been sold in the Roanoke city suit, still, as the railroad company is a domestic corporation of this State as well as Virginia, and the plaintiff, the Fidelity Company, has elected to invoke the jurisdiction of a court in this State in aid of its suit in Roanoke city, I do not think it can exclude the creditors of the railroad company from intervening in either court.

In the view we have taken of the rights of the improve-

ment company in this cause, the question of laches does not apply. It appears from the amended bill in the Crumlish suit, that the plaintiff never discovered until after December, 1882, that there was any adverse claim or denial of the right of the improvement company to the bonds, which it was entitled to under the agreement of April 29, 1878. It also appears in the record, that all the bonds issuable under the mortgage of April 1, 1880, had been negotiated in 1881, before said discovery was made; and consequently, even if the holders under that mortgage were not purchasers with notice, any delay after they had invested their money in 1881, could not be to their prejudice. It therefore seems to me, for this reason and others so apparent in the record as to require no discussion, that the defence of laches must be overruled.

For the reasons stated I am of opinion that both the decrees appealed from in these causes must be reversed,—that of November 29, 1887, at the costs of J. Garland Hurst, administrator *etc.*, the plaintiff therein; and that of September 11, 1888, at the costs of the Fidelity Insurance, Trust & Safe-Deposit Company, the plaintiff therein,—and that these causes be remanded to the Circuit Court for further proceedings there to be had therein according to equity and the principles announced in this opinion.

REVERSED. REMANDED.

CHARLESTON.

ARNOLD v. COBURN.

*(GREEN, JUDGE, Absent.)

Submitted January 19, 1889.—Decided February 25, 1889.

1. VENDOR'S LIEN—PARTIES.

In a suit to enforce a vendor's lien on land it is not error to decree a sale of such land to pay said lien without making other creditors having subsequent liens thereon parties and ascertaining the amounts and priorities of their debts.

*On account of illness.

39	272
38	407

32	273
43	282

32	272
166	232

2. VENDOR'S LIEN—PARTIES.

If the land, on which the vendor's lien exists, has been conveyed by trust-deeds to secure debts, it is proper in such suit to make the trustees in such trust-deeds parties, but it is not necessary to make the *cestuis que trust* in such deeds parties before decreeing in favor of the person holding the vendor's lien.

S. V. Woods for appellant.

Dayton & Dayton for appellees.

SNYDER, PRESIDENT :

In November, 1885, Jesse W. Arnold filed his bill in the circuit court of Barbour county against M. W. Coburn, in which he avers, that in consideration of love and affection for his daughter, the wife of said Coburn, and \$3,000.00 to be paid in three equal annual payments with interest from date, he did on November 2, 1874, sell and convey to said Coburn a valuable tract of land lying in said county, containing 233 acres, and that he retained a vendor's lien in the deed for said \$3,000.00; that the plaintiff is still the owner of two of said bonds of \$1,000.00 each, no part of which has been paid, and prays that his vendor's lien may be enforced by a sale of said land.

In March, 1886, the defendant filed his answer, admitting the allegations of the bill in all respects except as to the non-payment of said purchase-money. In regard to this he avers, that he and the plaintiff had by written agreement submitted all matters in difference between them, including two of the three bonds given for the said land, to three arbitrators, and that said arbitrators made their award, by which they determined, that the said two land-bonds had been reduced by payments and sets-off to \$1,111.43 with interest from August 1, 1885, and that this was all that remained due on said two land-bonds.

In October, 1886, James Pickens on his own petition was made a defendant in the cause. It is shown by the petition of said Pickens, that in January, 1885, he had become the owner by assignment of the third of said land-bonds, upon which he had in March, 1886, obtained a judgment in said court for \$1,649.80 against the defendant Coburn, and he

prays, that he may be decreed to have the first lien on said 233 acres of land *etc.*

In March, 1887, the defendant Coburn asked leave to withdraw his answer, whereupon Franklin Maxwell, a creditor of Coburn but not a party to the suit, objected to such withdrawal of said answer; and the court permitted Coburn to withdraw his answer upon his leaving in the cause attested copies of the same and the exhibits filed therewith. Subsequently the plaintiff filed an amended bill, in which he admits, that James Pickens had become the owner of one of said land-bonds, and avers, that said Pickens had since died, and that John D. and Dever Pickens had qualified as his executors. He further avers, that, after said 233 acres of land had been conveyed to the defendant Coburn, he, the said Coburn, by deed dated September 7, 1878, in which deed the plaintiff united as a grantor, conveyed the said 233 acres and a number of other tracts of land to James E. Hall, trustee, to secure a debt of \$6,600.00 to John D. Pickens, but that a large part of said debt had been paid by the sale of other lands of the said Coburn; that by another deed dated December 21, 1885, the said Coburn conveyed said 233 acres with other lands to James Pickens and A. G. Dayton, trustees, to secure the payment of \$3,000.00 to Dever Pickens; and that by another deed dated December 25, the said Coburn conveyed all of said lands to Thomas A. Bradford, trustee, to secure a large number of debts due from him to other creditors, among which is a debt of \$5,000.00 to Franklin Maxwell.

To this bill the said James E. Hall, trustee, James D. and Dever Pickens in their own rights and as executors of James Pickens, deceased, A. G. Dayton, trustee, Thomas A. Bradford, trustee, and Franklin Maxwell are made defendants, and its prayer is for the same relief as that asked in the original bill.

The defendant, Maxwell, filed his answer to this bill and made part thereof the answer of Coburn and the exhibits therewith to the original bill, which after having been filed had been withdrawn as aforesaid; and he averred, that the withdrawal of said answer was by collusion between the plaintiff and said Coburn, the latter being the son-in-law of

the former, and for the purpose of defrauding this defendant and other creditors of the said Coburn; that the aforesaid award and settlement between the plaintiff and said Coburn was valid and binding; and that the \$1,111.43 found by said award is the true balance due from Coburn to the plaintiff on the two land-bonds held by him.

After this answer of Maxwell had been filed the plaintiff amended his bill alleging, that said pretended award between him and Coburn was illegal, fraudulent and void and stating in detail the grounds, which rendered it invalid.

Depositions were taken by both the plaintiff and defendant, Maxwell, in respect to said arbitration and award, and said depositions fully and distinctly prove, that said award was invalid, both upon the ground that it was obtained by the fraud of said Coburn and upon mistake of the arbitrators in the application of the law to the facts, when they intended to decide according to the law. *Matheos v. Miller*, 25 W. Va. 817. On November 2, 1887, the court entered a decree against Coburn in favor of the executors of James Pickens for \$1,755.03, being the amount of the judgment recovered on one of the purchase-money-bonds for the aforesaid 233 acres of land, and in favor of the plaintiff for \$3,560.00 being the amount of the other two bonds for said land, and for both of which sums a vendor's lien existed on said 233 acres of land, and in default of the payment of said sums within thirty days the decree directed the sale of said land to pay the same, *etc.*

From this decree the defendant Maxwell has appealed.

It is contended for the appellant, that the plaintiff's bill is demurrable, because the creditors secured in the three trust-deeds referred to in the bill are not all made parties. This Court has repeatedly decided, that in a suit to enforce a vendor's lien it is not error to decree a sale of the land, on which such lien exists, before ascertaining the amounts of other liens on the land and their priorities, because in such suit the doctrine, which requires all the lienors in an ordinary creditors' suit to be made parties, does not apply. *Cunningham v. Hedrick*, 23 W. Va. 579; *Neeley v. Ruleys*, 26 W. Va. 686. This is conceded to be the law of this State by counsel for the appellant, but it is insisted, that this is not a suit for the sole purpose of enforcing a vendor's lien, and

therefore the rule applicable to such suits does not apply to this suit.

It seems to me, this is purely a suit to enforce a vendor's lien, and that it was so treated and considered by the Circuit Court. The trust-deeds on the 233 acres are all subsequent in date and subject to the vendor's lien; the rights of the creditors secured therein were all inferior to the said lien at the time they became creditors. It was necessary, or at least proper, to make the trustees in these trust-deeds parties, in order that a sale might divest the title, which they held, and confer upon the purchaser a clear title. This was done in this cause, and it was all that ought to be required in such cases. I do not think, the facts in this cause differ essentially from the facts in the two cases above decided, in which this Court held, it was not necessary to make the other lienors parties or to ascertain the amounts and priorities of their debts. The relief prayed in the bill and granted in the decree relates wholly to the vendor's lien, and in no manner adjudges or prejudices the rights of the trust-creditors. They may hereafter bring a new suit or make themselves parties to this suit and have their rights determined and their liens enforced, not only against the other lands conveyed in trust for them but also in respect to the surplus in the 233 acres, if any part thereof remains after satisfying the vendor's lien.

It is further insisted for the appellant, that the plaintiff sued for the enforcement of only two of the land-bonds, while the decree orders the payment of three bonds, and that this was error. The most, that can be said in favor of this objection, is, that it is technically true but substantially untrue; for the amended bill admits, that Pickens is the holder of the third bond, and that it is unpaid, and the executors of Pickens are made parties to the suit. It was entirely proper in view of these facts, that the decree should provide for the payment of all three of the purchase-money-bonds.

It appears in the foregoing statement, that the plaintiff united with Coburn and wife in the deed of September 7, 1878, by which the said 233 acres and other lands were, with general warranty, conveyed to Hall, trustee, to secure a debt to John D. Pickens. The appellant claims, that by this act the plaintiff in some manner lost his vendor's lien on the 233

acres, or became estopped from asserting it against the appellant, who is a *cestui que trust* in a subsequent deed on the same land. I confess, I am unable to appreciate the force of this claim or the alleged legal principle, on which it is asserted.

The plaintiff's bill avers, that a large part of this Pickens debt has been paid; and the other lands conveyed in said deed to secure it are ample to pay it without resorting to the 233 acres. But, if this were not so, I cannot see what right the appellant, who is not a party to said deed or secured by it, has to complain. He is secured, it is true, by a subsequent deed on the same land, but his lien is subject not only to the right of Pickens to have his debt paid out of said land, but also subject to the right of the plaintiff, if he is compelled to pay said debt, to be reimbursed by sale of said land, in preference to any right or claim of the appellant acquired by his subsequent trust-deed.

For these reasons I am of opinion that the decree of the circuit court should be affirmed.

AFFIRMED.

CHARLESTON.

CORE v. WIGNER.

32	277
43	275
43	280

*(GREEN JUDGE, absent.)

Submitted January 21, 1889.—Decided February 25, 1889.

1. VENDOR AND VENDEE—TITLE.

In a suit by vendor to enforce the payment of purchase-money under an executory contract for the sale of land, if defendant alleges a defective title of vendor, he may have a reference to ascertain the character of the title, or the court may, where the proof raises a doubt as to title, make such reference; but unless such reference be asked by the vendee, or such doubt appear, such reference is not necessary, and the court may proceed to subject the land to sale for the purchase-money.

*On account of illness.

2. SPECIFIC PERFORMANCE.

If at the date of the decree of sale the title, though originally defective, has become good by reason of the purchaser's possession under the statute of limitations, the court may go on to enforce the contract.

3. SPECIFIC PERFORMANCE—NOTICE—ESTOPPEL.

A vendor, who after sale to a vendee sells and conveys the same land to another without notice to the second purchaser of the first sale, is for that reason estopped from collecting by specific performance of the contract from the first purchaser the purchase-money for the land sold to the second purchaser.

E. Davis, for appellant.

R. S. Blair, for appellee.

BRANNON, JUDGE:

On the 14th, January, 1868, A. S. Core made an agreement, whereby Core sold to Wigner a farm bounded in part by J. M. Stephenson, Nathan Park, and M. M. Ifitchcock, said to contain 206 or 208 acres; but if it should contain more than 200 acres, Wigner was not to pay more than \$1,600.00 for it, and if it should contain 200 acres or less, Wigner was to pay \$8.00 per acre. Core was to convey with general warranty, whenever Wigner should ask a deed, retaining a lien for unpaid purchase-money. Core brought a chancery suit to enforce the payment of the purchase-money by sale of the land. Wigner answered alleging, that by actual survey the tract contained only 185 acres and perhaps not so much, and that by the agreement he was entitled to an abatement for fifteen acres from the \$1,600.00; and further that twelve acres more of the land was in dispute and claimed by others, who were threatening to take possession, which disputed land would entitle him to an abatement of \$96.00 more. He alleged and specified various payments and claimed, that these with the abatement for loss of quantity would more than pay for the land. He further averred, that since the commencement of the suit he had discovered, that plaintiff had no title to the land and never had, but that other parties had title to it, and he therefore asked a rescission of the contract of purchase, and a refunding of the purchase-money.

Plaintiff replied generally to the answer and also filed a special replication, in which he denied the allegation of the

answer, that the tract did not contain 200 acres, and denied that the purchase-money had been paid as claimed by Wigner, and denied the allegation of plaintiff's want of title. He averred, that defendant had entered into possession under his purchase on 1st of April, 1868, and had continued in quiet and peaceable possession ever since, and claimed, that he could hold the land by reason of such possession against all adverse claim, having been in possession more than ten years, and could not now complain of defect of title.

The case was referred to a commissioner to have a survey made to ascertain the number of acres sold by Core to Wigner, and to state an account between the parties in regard to the sale under the contract of sale, and report what balance, if any, was due for unpaid purchase-money. There were three surveys and reports of the master under orders in the case. The last report based on a survey of Douglas, county surveyor, submits without decision by him but for the decision of the court statements numbered 1 and 2,—the one based on the tracts containing $199\frac{1}{4}$ acres, the other on the quantity of 164 acres, at \$8.00 per acre, and finding a balance due the plaintiff of \$862.65.

There seems to be no controversy as to payments, but on the contents of the tract. This question is involved in the following facts: The contract of purchase declares that the land sold is bounded by J. M. Stephenson, Nathan Park and M. M. Hitchcock and others. It appears that in 1843, Vanwinkle, commissioner of forfeited and delinquent lands, conveyed to Isaac Lambert a lot of 200 acres, being lot No. 3 of a tract of 5,000 acres sold as forfeited or delinquent in the name of Worth. It seems that lot No. 6 in said tract was sold by said commissioner to one Jacob Cork, and 140 acres of it was sold for non-payment of taxes in his name in 1858, and purchased by Michael M. Hitchcock, who had the 140 acres surveyed by precise metes and bounds by the county-surveyor, the report being given in the record, but no deed is shown to Hitchcock. On the plat of Surveyor Douglass both lots No. 3 and the Hitchcock tract of 140 acres are represented, and it appears that there is an interlock between them, the Hitchcock boundary lapping upon lot No. 3, thirty four and one half acres. Deducting for lot No. 3 which con-

tains $201\frac{1}{2}$ acres two acres, for part of an entry made by Rollins, leaves $199\frac{1}{2}$ acres, the quantity on which one of the commissioners statements is based; and deducting the lap of $34\frac{1}{2}$ acres leaves lot No. 3 to contain $164\frac{1}{2}$ acres, the quantity assumed in commissioners alternate statement.

There is some question as to the true location of lot No. 3; but it seems to me that the figure formed on the surveyor Douglas' plat P P, by the lines A B, B C, C D, D A, correctly represent lot No. 3 of the Worth survey. Surveyor Douglas is of opinion, that the land sold by Core to Wigner is lot No. 3, and that Hitchcock's tax-purchase could not lawfully lap on it, because Cork, in whose name it was sold for taxes, purchased lot No. 6 in the Worth survey, yet Douglas is decided in stating in evidence, that by error the 140 acres of Hitchcock was made to lap over on lot No. 3. So it is plain that such lap exists.

Now in this case it is not a trial of title between the Hitchcock claim and the owner of lot No. 3 as to the territory within the interlock; but as the contract of sale between Core and Wigner calls for the Hitchcock land, we must first fix the line of that land and ascertain where it is, and that will be the line of the land sold by Core to Wigner. It may be true, that in laying down the Hitchcock tax-purchase of 140 acres it was by mistake made to encroach on lot No. 3, and it may be lot No. 3 is the superior title, though as to that we can not say under the light of this case; but when you once see, that there is a Hitchcock survey, which the contract admits and the evidence shows, and fix its place, you fix the limit there of Core's sale to Wigner. Core did not in terms sell lot No. 3 to Wigner; he sold him a farm bounding on Hitchcock land. How can he stretch the land beyond the line of the Hitchcock land,—make him take land he did not buy? The court can not make a contract. Wigner knowing of this trouble about the interlock between the lands, might very well and prudently have intended not to be involved in a lawsuit about it with Hitchcock, and for that very reason have called for the Hitchcock land, for that land had been made by actual survey ten years before the contract between Core and Wigner. The question of title is irrelevant.

It seems that Wigner and Hitchcock were in possession of their tracts of land ; but it does not appear, that Wigner was in possession of the interlock, and he says in evidence that he did not claim it ; but Hitchcock seems to have made an improvement within it as far back as before 1861. But possession is irrelevant. It is only a question, of how far Wigner's purchase went. The Circuit Court refused to limit his purchase to the Hitchcock line or make any abatement for what I have called the "interlock" but compelled Wigner to cross the Hitchcock line, and go on to the line C D of lot No. 3, and in doing so erred. Wigner's executrix, after the revival of the suit after Wigner's death, if there was an order of revival, filed an answer alleging, that Core had since the death of Wigner sold and conveyed to one Haga a tract of land covering this Hitchcock land, he having acquired it from Hitchcock subsequent to the commencement of the suit, and in so doing conveyed up to the line E P, including to Haga this $34\frac{1}{2}$ acres, thus recognizing the line E P and the Hitchcock land. So it would seem, that he does so recognize it. What further effect has this act on his cause ? He had filed with his bill a deed conveying this interlock, the very land he afterwards conveyed to Haga, and this deed not recorded would be no notice to Haga, if it includes this interlock ; and the vendor turns round and conveys to another the very land, which he seeks to make a former purchaser take and pay for, imposing a lawsuit on such former purchaser. He would thus get pay for the same land from two persons. But, while this action makes his claim inconsistent, the view I take gave him power to sell the interlock to Haga, as he had not sold it to Wigner ; but from Core's stand-point, he contending that he had sold this interlock to Wigner, and asking pay for it from Wigner, this act of conveying it to Haga on 22d January, 1885, would seem to be an estoppel against his obtaining a decree on 7th November, 1887, against Wigner, compelling him to pay for that identical land. This deed was merely tendered with the bill, and the answer rejected it ; and, if the court had held it insufficient, how could the plaintiff have complied with its order requiring another deed, after having disabled himself from conveying by conveying the legal title to Haga ? This is an additional reason for saying the court erred. It

should be added that Wigner says he never had set up any claim to any of the land within the interlock.

Claim is made by the defense for a further abatement of twelve acres between the lines B C and the dotted line E X on plat P P, based on a claim of one Vinton. It is not easy owing to the indefiniteness of the record to state the precise character of the claim. Vinton's claim or boundary is not shown by deed or title-paper further than a deed to him from Wolff, which does not show the source of his title so as to show just where or what he claims, and thus establish his line. If, as seems, he owns lot No. 4 of Worth survey, there would seem to be no conflict, for lots No. 3 and 4 are coterminous. No particular line of Vinton's is shown. There is apparently no ground for this abatement.

As to the allegation that plaintiff had no title the answer is very indefinite, not specifying what title conflicted with the plaintiff's or wherein the plaintiff's was defective. And the evidence makes this no better. There is no appearance that the plaintiff's title is defective, and Wigner took possession in April 1868, and was still in peaceable possession, when this suit began in July, 1879, and his title has, even if defective, become good. Moreover, if he had any serious reason to contest the title, he should have asked a reference specially as to title. *Middleton v. Selby*, 19 W. Va. 168. There should be no rescission of the contract.

The decree should have been on the basis of the second statement finding a balance of purchase-money of \$270.65 as of 19th June, 1882, amounting on 7th November, 1887, to \$342.00, which latter sum with interest and costs should have been decreed instead of \$1,140.52; and the decree complained of is to be reversed with costs to appellant in this Court, and a decree must be entered for the plaintiff for \$342.00, with interest from the 7th day of November, 1887, and costs of suit, instead of \$1,140.52, as decreed by the Circuit Court; and the cause is remanded to the Circuit Court for further proceedings.

REVERSED. REMANDED.

CHARLESTON.

NEASE V. INSURANCE CO.

*(JUDGE GREEN, absent.)

Submitted January 26, 1889.—Decided March 4, 1889.

1. EQUITY.

A doubtful or partial remedy at law does not exclude the injured party from relief in equity.

2. EQUITY—SHERIFF—JUDGMENT—CREDITORS.

A suit may be maintained in a court of equity by or in the name of the sheriff, under Code 1887, c. 141, s. 15, where there is a conflict between two or more execution-creditors in respect to the same fund or property, and where such suit will avoid a multiplicity of suits.

3. INSURANCE.

Where a policy of fire-insurance provides, that the policy shall be void in any case of a transfer or change of title in the property insured or the foreclosure of a mortgage thereon, the execution of a trust-deed on the property, after the insurance was made, under which no sale had been made at the time of the loss, will not avoid the policy.

4. INSURANCE.

An assignment of a fire-insurance policy subsequent to the loss is valid regardless of the conditions of the policy.

5. INSURANCE—ESTOPPEL.

When the requirements of the policy make it the duty of the insured to submit with the proof of loss a certificate of the nearest magistrate, and a certificate is furnished, to which no objection is made within a reasonable time, the insurer will be estopped from making objections, on the ground that it was not made by the nearest magistrate.

Tomlinson & Wiley for appellant.

Simpson & Howard and *Gunn & Gibbons* for appellees.

SNYDER, PRESIDENT:

The *Ætna Insurance Company*, a foreign corporation, in July, 1878, issued a fire insurance policy to *C. M. Moore*, for \$2,000.00. Of this amount \$1,000.00 was on the dwell-

*On account of illness.

32	283
35	675
32	283
47	608
47	610
32	283
56	588
57	45
32	283
60	57

32	283
165	537

ing-house of said Moore situate on his farm in Mason county, \$700.00 on his household furniture and other personal effects in said house, and \$300 00 on a piano. By renewals from time to time this policy was continued in force, until after the said property was destroyed by fire as hereinafter stated. In October, 1878, said Moore executed a trust-deed upon the land, on which said house was situated to secure debts due from him, and between that date and the time the fire occurred said Moore executed several other trust-deeds upon said land, and a number of judgments and decrees for money were recovered against him. In the fall of 1885, a suit in equity was brought in the Circuit Court of Mason county by Caroline Long against said Moore and others, to ascertain the liens on the lands of said Moore and to subject the same to the satisfaction of said liens. On Febreary 18, 1886, by a consent-decree entered in said cause the liens and their priorities were fixed, the lands ordered to be sold, and a receiver appointed to take possession of the lands and rent the same until January 1, 1887. The receiver at once took possession of the lands, but Moore continued to occupy and reside in the dwelling-house until after March 19, 1886, on which day the said house and a large portion of the insured property therein were consumed by fire. On the same day, but after the fire occurred, the said Moore assigned his policy and claim for insurance to A. A. Hanly, who in payment thereof drew his check for \$1,500.00 on the Ohio Valley Bank at Gallipolis and placed the same in said bank together with an agreement between him and Moore to the effect, that said check was not to be delivered to Moore or paid by the bank, until Hanly should notify the bank, that the *Ætna Insurance Company* had paid to him the amount of said insurance. On March 22, 1886, four exeecutions were issued from the clerk's office of the Circuit Court of Mason county and placed in the hands of H. G. Nease, the sheriff of said county. These exeecutions were against said Moore and in favor of C. P. T. Moore, the executors of John MacCulloch, deceased, and others. On the same day suggestions were sued out on said exeecutions, two of which were served on said A. A. Hanly as garnishee, and the other two on the *Ætna Insurance Company* as garnishee.

On May 19, 1886, the said H. G. Nease, as sheriff, suing at the relation and costs of said C. P. T. Moore and the executors of John MacCulloch filed his bill in the Circuit Court of Mason county against said C. M. Moore, the *Ætna Insurance Company*, the said A. A. Hanly and the other execution-creditors of said C. M. Moore, in which he sets forth the foregoing facts, and charged, that said executions were liens on the said insurance-fund in the order of their respective priorities, either in the hands of said insurance company or of the said A. A. Hanly as the assignee thereof; and praying that an injunction might issue to restrain the payment of said fund to either said C. M. Moore or said Hanly; and that the rights and priorities of the liens of said execution-creditors be ascertained, and that the amount due from said garnishees or either of them be fixed, and the same applied to the payment of said creditors according to their respective rights. An injunction was awarded, and issued according to the prayer of the bill.

The insurance company demurred to said bill and filed its answer thereto, in which it denied that any considerable portion of the household property insured by it was in said house at the time of the fire and destroyed thereby, or that the piano was the property of said Moore. Said answer averred, that by reason of the acts and transactions of the insured the said policy had become forfeited and void according to the provisions contained therein, and that the company was not liable to the said Moore or the plaintiff for any part of said insurance. The prayer is that said policy may be declared void, and all relief denied to the plaintiff.

Depositions and other proofs were taken and filed, the demurrer to the bill overruled, and on February 25, 1888, the cause was heard, and a decree entered therein, by which it was found and decided, that the *Ætna Insurance Company* was liable on said policy for \$1,700.00 with interest thereon from May 20, 1886, that being the whole amount of the insurance less the insurance on the piano; and having ascertained the aggregate of said amount as of the date of the decree to be \$1,878.50 the court ordered the insurance company to pay said amount and the costs of this suit to the plaintiff, and referred the cause to a commissioner to report the amounts and priorities of the liens on said fund.

From this decree the *Ætna Insurance Company* appealed.

The first question is as to the demurrer to the bill. Our statute provides: "For the recovery of any estate, real or personal; on which a writ of *fiери facias* is a lien under this chapter, or on which the judgment on which such writ issues is a lien, or the enforcement of any liability in respect to any such estate, a suit may be maintained either at law or in equity, as the case may require, in the name of the officer to whom such writ was delivered. * * * But any person interested may bring such suit at his own costs, and in the officer's name." Acts 1882, c. 127, s. 15; Code 1887, c. 141, s. 15. This statute plainly authorizes a suit of this character to be instituted or prosecuted in the name of a sheriff. The only question is whether it should be at law or in equity. The well-settled general rule, that equity has no jurisdiction; where there is a plain and adequate remedy at law, does not of itself afford a sufficient test of the jurisdiction; for it is also true, that a doubtful or partial remedy at law does not exclude an injured party from relief in equity; and hence a just discrimination becomes frequently a subject of doubt and perplexity. The application of the principle to a particular case must depend altogether upon the character of the case as disclosed by the pleadings. It is safe to say however, that, where it is doubtful, whether or not there is an adequate and complete remedy at law, a court of equity will take jurisdiction. 1 Bart. Chy. Pr. 65, 67; *Spotswood v. Higgenbotham*, 6 Munf. 813; *Swann v. Summers*, 19 W. Va. 115. Jurisdiction in equity is sustained where it will avoid a multiplicity of suits; and it has also been sustained, where there was a conflict between two execution-creditors. *Watson v. Sutherland*; 5 Wall. 78. It seems to me, that these authorities and others, which might be cited, fully sustain the jurisdiction of a court of equity in a suit such as the one at bar.

Here we have four execution-creditors claiming the same fund; a dispute about that fund,—Hanley, one of the garnishees, claiming that he owed the debtor nothing, until the fund was paid to him by the insurance company, and the insurance company, the other garnishee, claiming, that it owed neither the debtor nor Hanly; and besides the fund was likely

to be lost if it should be paid to the insolvent debtor, and therefore it was proper to come into equity to enjoin such payment, and preserve the fund. The demurrer to the bill was rightfully overruled.

It is contended by the appellant, that there is no liability upon it because of the several trust-deeds executed by C. M. Moore on the land, upon which the insured property was located, and the decree ordering the sale of said land and placing it in the possession of a receiver. This contention is based upon that provision of the policy, which declares, that, "in case of any transfer or change of title in the property insured by this company, or any undivided interest therein, or foreclosure of a mortgage thereon, such insurance shall be void and cease." This objection, is fully answered by the decision of this Court in *Quarrier v. Insurance Co.*, 10 W. Va. 507. In that case, on page 539, the Court says: "If the deed of trust was executed after the policy, it did not violate the provisions of the policy; for it was not a sale of the property, or any change of the title, within the true meaning of this provision. For it has often been decided that a mortgage or deed of trust, before its foreclosure, is no alienation or change of title, according to the true interpretation of these words, when used in a policy of insurance."

In the case at bar the proof is, that no sale of the insured property had been made at the time of the fire, and that Moore, the insured, was then residing in it with his family.

The policy provides, that it shall not be assignable without the consent of the company expressed by an indorsement made thereon. The policy in this instance was not assigned, until after the loss had occurred, and the liability of the company had been fixed. An assignment subsequent to the loss is valid regardless of the conditions of the policy. *Wood, Ins. § 94*; *Franklin v. Insurance Co.*, 43 Mo. 491; *May on Ins.* 468. This is the law, supposing the assignment of the policy by Moore to Hanly to be valid and binding; but it was not, because the assignment was not only fraudulent but conditional, and the condition never was and never will be performed.

It is further contended for the appellant, that there was no competent evidence of the loss of the furniture and effects or

of the value of the house destroyed. Soon after the loss occurred, the insured made out proofs of loss in the form required by the policy, stating therein each article destroyed by the fire, and its value. This was furnished to the company, and no objection was ever made to it, or any further proof required. It is admitted, that, while the proof of loss thus made out is admissible as *prima facie* evidence of the facts therein stated in favor of the company, it is not admissible as proof of such facts in favor of the insured. But there is other evidence in this case of the loss. C. M. Moore in his deposition says, that immediately after the loss he made proof thereof and files a copy thereof with his deposition, which he states to be a true account of the property lost, and its value. This is corroborated by the testimony of Gibbons, who assisted Moore to prepare said proof of loss. Other parts of the record show, that the value of the house was from \$1,000.00 to \$1,200.00, at the time it was destroyed by the fire. This, it seems to me, in the absence of any contradictory or rebutting testimony, is sufficient proof of the property lost and of its value.

It is further claimed, that the proof of loss was not certified by the magistrate or notary public living most contiguous to the place of loss, as provided for in the policy. As before stated, there was no objection by the company to the proof of loss or to the certificate attached thereto. In order to take advantage of a certificate of the notary public of this character, the company must seasonably object thereto specifically denominating the grounds of objection. *Wood, Ins. § 417; McMasters v. Insurance Co.*, 25 Wend. 379. Where a certificate was furnished, but not of the nearest magistrate, and no objection was made on that ground, it was held, that the insurer was estopped from proving, that the magistrate was not the nearest. *Taylor v. Insurance Co.*, 51 N. H. 50; *Wood on Ins. § 416, p. 713, note.*

Upon the whole record, I have been unable to discover any error to the prejudice of the appellant and am therefore of opinion to affirm the decree of the Circuit Court.

AFFIRMED.

CHARLESTON.

DAVIS v. PT. PLEASANT.

*(GREEN, JUDGE, Absent.)

Submitted January 25, 1889.—Decided March 4, 1889.

32	289
32	289
32	289
32	305
32	289
146	38
32	289
65	136

1. TOWNS—CORPORATE LIMITS—COMMON-LAW PRACTICE.

It is not necessary to the validity of an order made by the Circuit Court under chapter 47, § 49, Code 1887, approving a change of the corporate limits of a town, that the order should show on its face, that the town contains less than 2,000 inhabitants. (p. 293.)

2. TOWNS—TAXATION.

Where a town under said chapter of the Code extends its corporate limits so as to include agricultural or farming lands and imposes municipal taxes on them, though they are not laid off into streets and alleys and not laid out in lots and are not so near streets or alleys as to be directly benefited by them or derive any peculiar benefit from the incorporation, the courts can not affect its action or prevent such taxation. (p. 295.)

Gunn & Gibbons and Tomlinson & Wiley for appellant.

Knight & Couch and W. A. Quarrier for appellee.

BRANNON, JUDGE:

On 6th of September, 1886, the Circuit Court of Mason county made the following order: "*Ex parte* Town of Point Pleasant in Mason county. This day came the town of Point Pleasant in Mason county by D. W. Polsley, its attorney, and filed a certificate of the council of said town showing, that a change had been made in the manner required by law in the corporate limits thereof, and that by such change the said corporate limits are as follows: Beginning." * *

* "It is therefore ordered, that said change in said corporate limits be and the same is hereby, approved and confirmed; and the clerk of this court is ordered to deliver to the said council a certified copy of this order as soon as practicable after the rising of this court."

*On account of illness.

In September, 1887, William E. Davis filed a bill in the Circuit Court of Mason county setting forth, that the town of Point Pleasant was incorporated by an act of the General Assembly of Virginia passed 19th December, 1794, with certain given bounds, which remained the same until the order of the Circuit Court above given, and that the plaintiff was owner of a tract of 260 acres of farming land above said town; that between this farm and the town are the large farm of Charles Waggener and the large farm of Henry J. Fisher; that there was not prior to 6th September, 1886, and was not at the filing of the bill any house or other building on plaintiff's land, nor did any person live on it; that there were no streets, roads or alleys from said tract of land to said town or elsewhere except the old county road up the Kanawha river and the Clarksburg road, which runs through plaintiff's farm about 100 yards; that no portion of said tract has ever been laid off or offered for sale as town lots, and there are no streets or alleys through said land, but the same is fenced and used purely as a farm. The bill further stated, that the farms of Fisher and Waggener were practically in the same condition, except that there was a dwelling on each, and the farm of Waggener was occupied by Waggener and family, and the Fisher farm by a tenant, and that neither of them had ever been laid off into lots, streets or alleys, or offered for sale in such divisions; that by the judgment and order of said Circuit Court at the instance of said town on the 6th of September, 1886, the boundaries of said town were extended so as to include the Fisher farm, the Waggener farm, the MacCulloch farm and the farm of the plaintiff, and also a large number of acres of mountain land, some farming land above the old town on the Ohio river, and the banks and bed and running stream of the Ohio river fronting the new and old town boundary, and one half of so much of the Kanawha river as fronts the new and old boundary; that the present boundary contains ———— acres, capable of containing a city population of 150,000; that Point Pleasant had been incorporated in 1794; that its population by the last census was 1,086, and in 1870, 773. The bill then alleged, that the object and intent of the authorities of said town in so enlarging its boundaries and in-

cluding farms, mountains and rivers, upon which there were no population or town lots or streets or alleys, was to embrace property and lands formerly outside the corporate limits, so as to tax them for the purpose of improving property inside the town, without rendering any service or benefit to the new subjects of taxation; that the town had never made any effort to acquire streets or alleys over or through the plaintiff's farm, or the Waggener, Fisher, or MacCulloch farms; that said town had levied for the year 1887, a tax of \$181.50 on plaintiff's farm and placed the same in the hands of its officer for collection. The bill charged, that the act of the town-council in so enlarging its boundaries for the purpose of taxing said farms, rivers and mountains as town-property was fraudulent and void; also that it was *ultra vires* for the town, even if the extension be lawful, to impose taxes on his land, until it acquired streets and alleys leading from the old town to the plaintiff's farm, and until it acquired streets and alleys through his farm, and worked and repaired the same, and until the blessings and benefits of the town-government should be extended over said lands; and that the order of the Circuit Court enlarging said town-limits was null and void.

The prayer of the bill was, that the town be enjoined from collecting any tax on plaintiff's farm, and that the order of the court enlarging the town boundaries be vacated as illegal and void. An injunction was granted.

Plaintiff filed an amended bill, which seems to be unnecessary, as it alleges mere matter of law or argument. It alleges, that the power to create, alter or amend the charter of a municipal corporation is a high prerogative act of sovereignty; that by the constitution of this state the power to do so is vested in the Legislature except charters of towns of less than 2,000 population, in which case the power is vested in the Circuit Court, and, if the town have more than 2,000 inhabitants, the court would have no jurisdiction; and that, to render the judgment and order of the Circuit Court valid, there must be a judicial finding on the face of the order, that the village has less than 2,000 inhabitants, and in its absence the order is on its face void; and charged that this order was void.

After an order of the court overruling a motion to dissolve the injunction the town filed its answer. This answer admitted the facts alleged in the bill, except that it denied "that there was not prior to that date, and is not now, any house or building on said land, nor did nor does any person live upon said land;" and averred that at the date of the order of extension, and for years before, there was one small dwelling in which a family resided on plaintiff's land. It admitted that it was true that there were no streets, roads, or alleys leading from said land to Point Pleasant, or elsewhere, except the county road up Kanawha river, and the Clarksburg road. It denied that no portion of said tract had ever been laid off into town lots, without any specification further than the simple denial. It admitted that plaintiff's land is fenced up and used as farming lands, and that the farms of Waggener and Fisher were practically in the same condition, except that there were some fifteen dwelling-houses on the south portion of the Waggener farm, which portion is laid off into streets, and that more than twenty families occupy the buildings. It averred that a portion of the Waggener farm was sold and laid off into lots, streets, etc., and had been built upon, and was then no part of the farm. It denied that the object of the extension was to embrace property and lands to tax them to improve property inside the town, without rendering it any benefit, and averred that since the extension the town had expended \$2,500.00 in improving a street leading to and through plaintiff's land, known as the 'Clarksburg Road,' mentioned in the bill, and was contracting for improving a street leading up Kanawha river, to and through plaintiff's land. It denied that the town had never made any effort to acquire streets or alleys over or through plaintiff's land, or the Fisher, Waggener, or MacCulloch farms, but that before the suit commissioners had been appointed and had laid off a street through the Fisher and Waggener lands, to intersect the Clarksburg road at or near plaintiff's land, and was only waiting the termination of the suit to open and construct said street. It denied that the act of extension was fraudulent and void, and that it was *ultra vires* to assess taxes until the town acquired streets and alleys leading from the old town to plaintiff's farm. It denied that it had not

pursued the statute, and that the order of extension was void. The answer averred that a large portion of lands taken into the town by the extension had been laid off into streets, and worked and improved, and a goodly number of lots laid off had been sold, and fifteen new buildings erected thereon, and others being erected. The answer states that there were but five or six vacant lots within the old boundary, and those not for sale at any reasonable price; and that the number of inhabitants taken in by the extension was about 600. It denied the legal conclusion of the amended bill that the circuit court order was void."

There was a general replication to this answer. No evidence was taken. The case was heard on the bill, the answer, general replication and a renewed motion to dissolve the injunction; and a decree was pronounced perpetuating the injunction and vacating the order of the Circuit Court enlarging the boundaries of the town; and the town appeals.

By Code c. 47, s. 47, it is provided, that no special act shall be passed incorporating or amending the charter of any town containing a population of less than 2,000. By section 48 it is provided, that any five freeholders desiring to change the limits of such town may petition the council, setting forth the change proposed, and the council shall order a vote as directed in that section, and, when the result of the vote is in favor of the change, the council shall certify the same to the Circuit Court, which shall enter an order in substance as provided in that section, which order must approve and confirm the change and direct a copy of the order to be certified to the council, and from the date of the order the corporate limits of the town shall be as set forth in such order.

The plaintiff contends that, as the council and Circuit Court have no power under the statute to alter the charter or limits of a town except in cases of towns with less population than 2,000, the order of the Circuit Court enlarging the bounds of Point Pleasant is void, because it does not ascertain or declare in any manner, that the population was less than 2,000, that being a jurisdictional fact. The Circuit Court is a court of general jurisdiction, and, when proceeding in the exercise of its ordinary common-law powers, it is

presumed to have jurisdiction of the particular case; and, if the contrary be alleged, it must be proven, (*Mayer v. Adams*, 27 W. Va. 251; *Hall v. Hall*, 12 W. Va. 1.) and proven by the record, (*Wandling v. Strav*, 25 W. Va. 692.) With inferior courts of limited jurisdiction the rule is reversed, and their jurisdiction must appear affirmatively; and in the language of Judge GREEN, in *Mayer v. Adams*, *supra*: "Even though a court be a superior court of general jurisdiction, still, when the particular proceedings are not according to the course of common law, but under a statute given a summary remedy, the record on its face should show generally that the particular case comes within the statute, and that the statute has been followed." See *Harvey v. Tyler*, 2 Wall. 342; *Thatcher v. Powell*, 6 Wheat. 119; 7 Rob. Pr. 16; *Pulaski Co. v. Stuart*, 28 Gratt. 872.

We do not deny these principles in proper cases, but do not think them applicable here. The town-council under the statute exercised the first and most important function in the proceeding. Before entertaining the petition and ordering a vote on the question of change of boundary it should have been satisfied, that the town contained a population of less than 2,000. It must be taken, that it did satisfy itself, that such was the fact. The act requires the result of the vote to be certified to the Circuit Court; and without requiring the court to make any inquiry, give any notice or citation or take any further steps in the matter, it declares, that said court "shall thereupon enter an order in substance as follows: A certificate of the council of the city (or town or village, as the case may be) of——— was this day filed, showing that a change has been made, in the manner required by law, in the corporate limits thereof, and that by such change the corporate limits thereof are as follows: Beginning, *etc.* It is therefore ordered that said change in said corporate limits be, and the same is hereby, approved and confirmed, and the clerk of this court is directed to deliver to the said council a certified copy of this order as soon as practicable after the rising of this court." The court is required to enter that order. Nothing further is required of it by the statute. It has but to see, that the certificate from the council is such, as the statute requires to enable it to em-

body in its order the matter required by the statutory form. The specification by the statute of a particular order embodying particular matter makes such order all-sufficient and dispenses with the necessity that the order should show on its face the population of the town, even if otherwise the court would be required in its order to show such fact. The action of the Circuit Court is purely ministerial and in a line specified by the statute and *ex parte*.

Has the town the right to tax this farm? Where the corporate limits include rural or agricultural lands, never divided into town-lots, not needed or capable of use for town-lots, and receiving no direct benefits from the municipal government or expenditures, questions have arisen in the courts as to the right to subject such lands to ordinary municipal taxation. The power to fix or enlarge the corporate limits is not disputed; but the power to require such lands to contribute to the municipal treasury has been controverted. In Kentucky the principle has been adopted, that the "courts will in such cases control and limit the taxing power to that point or line, where it ceases to operate beneficially to the proprietor in a municipal point of view." The general rule there is, that the right to tax for real municipal purposes extends only to such land as has been surveyed and divided into lots, but the right to tax may under circumstances extend to property, which has never been surveyed and divided into lots. *Cheaney v. Hooser*, 9 B. Mon. 330; *Sharp v. Donovan*, 17 B. Mon. 177; *Covington v. Southgate*, 15 B. Mon. 491. 2 Dill. Mun. Corp. § 794. Iowa has followed the Kentucky rule in several cases. *Morford v. Unger*, 8 Ia. 82; *Butler v. Muscatine*, 11 Ia. 433. These cases proceed on the theory, that no benefit accrues to the owner of the land from the corporation; but, as Justice MILLER says in *Kelly v. Pittsburgh*, 104 U. S. 78, of the owner of the farm, it may be true, he does not receive the same amount of benefit from some or any of these taxes as some living in the heart of the city. It is probably true, that his tax bears an unjust relation to the benefits received. But who can adjust with precise accuracy the amount, which each individual in an organized civil community shall contribute to sustain it or insure absolute equality of burdens and fairness in their distribution?

We can not say judicially, that Kelly received no benefit from the city organization. These streets, if they do not penetrate his farm, lead to it. The schools may receive his children.

But it is plain that the Kentucky and Iowa rule is, as Judge DILLON in *Municipal Corporations*, § 594, and Judge COOLEY in *Constitutional Limitations*, 501, remark, arbitrary, and the obstacles in the way of the practical application are almost insurmountable. Each case would turn on its own facts and be a rule only unto itself. There is no fixedness of principle in it. It would be productive of endless litigation. It would run counter to Code 1887, c. 47, s. 31, that the tax-levy shall be "on all real and personal estate therein (in the town) subject to state and county taxes," leaving it to the courts to exempt some property, while other property is taxable. The rule has been repudiated in Mississippi, *Martin v. Dix*, 52 Miss. 53; also in Maryland, *Groff v. City*, 44 Md. 67; also by United States Supreme Court in *Kelly v. Pittsburgh*, 104 U. S. 78; also in Nebraska, *Turner v. Althaus*, 6 Neb. 54. I think it contrary to the principle of *Powell v. City of Parkersburg*, 28 W. Va. 698. Though in that case this particular question and the conflicting authorities upon it were not discussed, yet it was an effort to release from city-taxes three acres of land used for agricultural purposes, not laid off into streets and alleys and lots, or in any manner connected with city-property, and the court held the broad principle, that the city could under Code, c. 47, levy taxes upon all real and personal property within its corporate limits

It seems, that under this extension Point Pleasant has an area of 1,228 acres. It seems hard, that the plaintiff's farm separated from the town proper by two other large farms and not likely to derive any benefit from inclusion within it should pay municipal taxes. Apparently objectionable in some instances as is this practice of extending corporate limits over large areas of agricultural lands for no other purpose than to gather taxes, yet the courts are powerless to afford relief. It is the voice and power of the people applied under authority granted them by the Legislature; and the only relief must come from better legislation on the subject

The legislature has delegated to the town-council and people this function. It is done virtually by the Legislature.

The appellant insists that the sole object of the extension was the imposition of taxes, which he denominates "fraud," and asks relief under that head. But fraud can not be imputed to the Legislature in the passage of an act, so as to overthrow it. Cooley, Const. Lim. 187, and note 1. Neither can a court impute fraud and corrupt intent to council and people in acting under color of law. 1 Dill. Mun. Corp. § 311. For reasons stated in the opinion in *Powell v. Parkersburg*, supra, I think equity had jurisdiction in this case.

The decree of the Circuit Court must be reversed, the injunction dissolved, and the bill dismissed with costs to defendant in both courts.

REVERSED. DISMISSED.

CHARLESTON.

WALKER v. RUFFNER.

*(GREEN, JUDGE, absent.)

Submitted January 26, 1889.--Decided March 4, 1889.

1. JUDICIAL SALES—DECREE.

R., administrator of M., filed a bill in the County Court of Kanawha county in April, 1876, against W. and others to enforce a vendor's lien on a lot of land situated in Charleston, W. Va., then owned and claimed by W. R. acted as solicitor for plaintiff and was appointed special commissioner to make the sale in June, 1876. After being offered on several occasions, and the sale postponed at one time to accommodate W., said lot was sold on the 25th day of November, 1876, for \$700 00, which appears to have been all it was worth at the time. B. H. S. and R. as such administrator, became the purchasers. The sale was confirmed without exceptions on the 20th day of December 1876, and the purchasers went into possession and have so continued. After the application of the proceeds of said sale there was left a balance due said administrator, and a decree was rendered against W. for said balance, which was voluntarily paid by

*On account of illness.

32	297
34	280
32	297
38	55
32	297
39	123
32	297
41	274
32	297
48	16

32	297
65	131

W., October, 28, 1881. Since said salesaid property has increased in value from several causes, and when this suit was brought, in 1887, was worth about \$3000.00. *Held*: The decree appointing R. a special commissioner to make sale of said lot and the decree confirming the purchase by R. as such administrator, were voidable, and could have been so shown by W. in the suit, which directed the sale, to which he was a party, if he had been so disposed.

2. STATUTE OF LIMITATIONS—DECREE.

After the lapse of nearly ten years a party to a suit will not be heard to impeach a decree rendered therein by original bill under the circumstances shown in this case, unless some valid excuse is shown for this long delay.

Brown & Jackson and *Miller & Gallaher* for appellants.

Knight & Couch for appellee.

ENGLISH, JUDGE:

At the May rules in the year 1876, David L. Ruffner, administrator of the estate of Maria McFarland, deceased, filed a bill in chancery in the County Court of Kanawha county against Henry S. Walker, The Charleston Institute, a corporation under the laws of West Virginia, Charles C. Lewis, Benjamin H. Smith and Isaac N. Smith, defendants, in which he alleged in substance, that the said The Charleston Institute being possessed in fee of a parcel of land on the southeast side of Summers street between Virginia and State streets in the city of Charleston Kanawha county, W. Va., laid off said parcel of land into lots and proceeded to sell the same and did sell lot No. 1 of said parcel of land to the appellee, Henry S. Walker, at the price of \$1,600.00, of which sum said Walker paid \$500.00 at the time of sale and executed four notes, dated the 26th day of April, 1873,—the first for \$20.00 payable one year after date; the second for \$360.00 payable two years after date; the third for \$360.00 payable three years after date; and the fourth for \$360.00 payable four years after date,—all payable to the order of the Charleston Institute at the First National Bank of Charleston, and all bearing interest at six *per cent. per annum* from date until paid; to secure the payment of which the vendor's lien was retained upon said lot No. 1, which lot is described in a certified copy of the deed to said Henry S.

Walker, which is filed as Exhibit No. 1 with said bill; that the said The Charleston Institute transferred to said Maria MacFarland, who was then in life, the second and third notes for \$360.00 each, payable respectively at two and three years after date, in consideration for some stock, she then held in The Charleston Institute, which was surrendered by her and retired and cancelled; that said Maria McFarland died in July, 1874, and that the plaintiff, as her duly qualified administrator, holds said two notes, one of which would fall due on the 29th day of April, 1875, and the other on the 29th day of April, 1876; that no part of said notes or either of them had been paid, and he exhibits them with his bill; that said \$20.00 note was assigned by The Charleston Institute to C. C. Lewis and had been fully paid; that the fourth of said notes for \$360.00 due four years after its date was assigned by said Institute to Benjamin H. Smith and Isaac N. Smith, and the plaintiff did not know, whether any part of the same was paid or not, and called on B. H. and I. N. Smith to discover how much, if anything, had been paid upon the note held by them; and prayed, that said lot No. 1 might be sold by virtue of the lien reserved as aforesaid in said deed.

C. C. Lewis answered said bill, admitting the payment of said \$20.00 note by the defendant Henry S. Walker; and the defendants B. H. and I. N. Smith answered said bill stating, that they were the owners of the fourth purchase-money note given by Henry S. Walker as part of the deferred instalments for said lot No. 1; that said note was for \$360.00 dated April 26, 1873, and payable four years after date with interest subject to a credit of \$200.00 paid May 15, 1874, and prayed, that it might be decreed to be a lien upon said lot, and that their interest might be protected; and they filed said note with the credit indorsed with their answer.

On the 28th day of June, 1876, a decree was entered in said cause ascertaining the aggregate amount of the notes held by plaintiff, including interest to that date, to be \$856,-80, and that the balance due on said fourth note held by I. N. and B. H. Smith was a lien upon said lot No. 1; and decreeing, that, unless the defendant Henry S. Walker should pay said sum found due the plaintiff with interest within

thirty days from the date of said decree, said David L. Ruffner, who was thereby appointed a special commissioner for the purpose, should advertise and sell said lot for cash as to twenty five *per cent.* of the purchase-money, and as to the residue upon a credit of twelve, eighteen and twenty four months.

It appears from the report of David L. Ruffner, special commissioner, that said Henry S. Walker having failed to pay, as required by said decree, the amount therein ascertained to be due plaintiff, he advertised said property for sale on the 12th day of October, 1876, and after postponing said sale on several occasions he finally on the 27th day of November, 1876, sold said lot to B. H. Smith (who was the sole owner of said note assigned to B. H. Smith and I. N. Smith) and to D. L. Ruffner, as administrator of M. McFarland, deceased, jointly in proportion to their respective claims upon the said lot, at the price of \$700.00, that being the highest bid for the same. On the 20th day of December, 1876, said sale was confirmed by the court, and the amount so bid on said lot after deducting the costs and commissions was so apportioned as to credit the amount due plaintiff from said defendant Walker with the sum of \$495.82, leaving still due plaintiff from said Walker a balance of \$382.40, and also to credit the amount due said B. H. Smith with \$118.58, leaving still unpaid on said note as of November 27, 1876, the day of the sale, the sum of \$91.66; which report remaining unexcepted to was confirmed, and judgment was rendered against said Walker for said balance of \$382.40 and interest, and execution was awarded on said judgment; and William A. Quarrier, as special commissioner, was directed to convey said lot or parcel of land to said D. L. Ruffner, administrator as aforesaid, and B. H. Smith jointly in the proportion of 807-1000 to the former and 193-1000 to the latter; which deed was executed by said Quarrier, as special commissioner, dated on the 20th of December, 1876, and acknowledged the 11th day of July, 1881.

On the first Monday in February, 1887, said Henry S. Walker filed a bill in the Circuit Court of Kanawha county against said David L. Ruffner, administrator of Maria McFarland, deceased, The Charleston Institute, a corporation,

Charles C. Lewis, B. H. Smith, D. C. Gallaher, administrator of I. N. Smith deceased, and the unknown heirs at law of Maria McFarland deceased, the object of which was to vacate, annul and set aside the sale made by said David L. Ruffner, as special commissioner, and to cancel and annul the deed made in pursuance of said sale to said David L. Ruffner, as administrator of the estate of Maria McFarland, deceased, and B. H. Smith.

The plaintiff in said bill sets forth in detail the circumstances in reference to the purchase of said lot by himself from The Charleston Institute, the amount of purchase-money he was to pay, the amount paid in cash, and the time and manner, in which the residue was to be paid, also the manner, in which the said Maria MacFarland's administrator asserted a vendor's lien against said lot No. 1; that said bill was filed by said D. L. Ruffner, solicitor for D. L. Ruffner, administrator, the two being one and the same person; that by the decree enforcing said alleged lien said D. L. Ruffner was appointed special commissioner on the 28th day of June, 1876, to make sale of said lot, to satisfy the lien ascertained to exist in favor of said D. L. Ruffner, administrator *etc.*; that said D. L. Ruffner, as such special commissioner, on the 27th day of November, 1876, made sale of said lot under said decree, at which sale said D. L. Ruffner, as administrator as aforesaid, and B. H. Smith became the purchasers of said lot for the price of \$700.00 less than one half the amount, which said Walker agreed to pay The Charleston Institute for same; that said lot brought at said sale less than one third of its value; that after applying the proceeds of said sale to the unpaid purchase-money amounting to \$856.80 with interest added to June 28, 1876, all the balance of said purchase-money having been paid by the plaintiff, Walker, there was still a considerable sum due on the purchase-money of said lot, for which a decree was taken against said Walker, which was afterwards paid by said Walker to said D. L. Ruffner, administrator as aforesaid, as shown by his receipt filed with the plaintiff's bill; that the said D. L. Ruffner in making sale of the said lot under the said decree was acting as the agent of plaintiff, and in purchasing or attempting to purchase the said lot at said sale and under the circumstances

the said Ruffner violated his duty as such agent and as an officer of the court, and that by so doing he committed a legal fraud upon plaintiff, and thereby prejudiced and injured him greatly; that the said sale and purchase by said D. L. Ruffner under the circumstances aforesaid were fraudulent, illegal and void and could not divest the plaintiff of his interest in said lot. And he prays, that said sale and the deed made in pursuance thereof may be set aside, cancelled and annulled, and that said lot may be again exposed to sale.

C. Q. Smith, A. Q. Smith, and Harry B. Smith answered plaintiff's bill stating, that they and the infant children of Caroline Q. Smith, to wit, Elsie, Isaac N. and Christopher T. Smith, were the sole devisees as to the property mentioned in the bill of Benjamin H. Smith, deceased, and they deny that the plaintiff, Walker, has ever paid in full for said property sold to him, and claim, that he still owes them, as such devisees, about \$100.00 with interest thereon, as more fully set forth in the answer of C. C. Lewis, executor of B. H. Smith, filed therein. They adopt the answer of Maria McFarland's administrator, and they deny, that plaintiff's claim has any equity as against them now, after so many years have elapsed, and that the acts and acquiescence of plaintiff himself in the proceedings claimed to have prejudiced him refute any such pretensions or claims.

C. C. Lewis, as the executor of the last will and testament of B. H. Smith deceased, also answered said bill, exhibiting a copy of said Smith's will and claims, that, in the event the sale aforesaid to his decedent be set aside, the court should decree him, as such executor, the sum of \$91.66 with interest from November 27, 1876, being the balance due the estate of said B. H. Smith, there being that amount still unpaid by said Walker on the original purchase-money.

The devisees of said B. H. Smith also file a petition in said cause showing, how said balance of purchase-money still remains unpaid by said Walker; alleging that said sale complained of in the bill was proper, fair, and just, and the rights of no one injured thereby; and that by plaintiff's own admissions of payment by virtue of the sale aforesaid he acquiesced in said sale, and it is now too late for him to set up a claim so stale and unjust; and that they may be decreed the owners

of the interests so purchased in said lot and confirmed to said B. H. Smith by the decree of December 20, 1876.

The infants, Elsie Smith, Isaac N. Smith and Christopher T. Smith, answered by guardian *ad litem*. Said Ruffner demurred to said bill, and the demurrer was overruled.

The defendant David L. Ruffner, administrator of Maria McFarland, deceased, also answered said bill giving a full statement of the matters, out of which said litigation originated, including the original sale to and contract with the plaintiff, Henry S. Walker, and the manner, in which he, as the administrator of Maria McFarland, came into the possession of the claims against said Walker, under which he sought to enforce the vendor's lien, as to the time a decree was obtained for the sale of said lot, and the terms and conditions of said sale; averring that said property was advertised and offered for sale by him first on the 12th day of October, 1876, that the sale was postponed at the request of the plaintiff, Walker, until the 11th day of November, 1876, when the property was again offered for sale, and again the sale was postponed to the 25th of November on account of want of bidders, on which day said property was again offered for sale, and, respondent having received another message from said Walker to go on with the sale, the crying of bids was continued for a while, when said sale was again postponed until the 27th day of November, 1876, on which day said sale was concluded and the property was struck off to B. H. Smith and D. L. Ruffner, administrator of M. MacFarland, they being the highest bidders for the same, at the price of \$700.00, which, he claims, was the most that could be obtained for said lot; and that on the 20th day of December, 1876, the court having received the report of said sale confirmed the same without exception; and that, the proceeds of said sale not being sufficient to satisfy the decree of June 28, 1876, the court gave the administrator of said M. McFarland a judgment for the unsatisfied balance, amounting to \$382.40 with interest from the 27th day of November, 1876, on which judgment execution was issued and returned, "No property found," and said judgment was docketed according to law; that said suit in equity was instituted by the plaintiff, Walker, nine years and ten and a half months after the decree was

rendered in said cause confirming said sale; and that the bringing of said suit by said plaintiff, Walker, was the first intimation he had received from said plaintiff, that he had ceased to acquiesce in everything connected with said sale. He also states, that he at once took possession of said lot and has been in quiet possession thereof ever since up to the institution of said suit; that he has paid all the taxes assessed upon said lot during that time and has also paid the delinquent taxes for 1875 and 1876, which were unpaid by Walker, and for which the auditor had placed the lot in the hands of the sheriff of Kanawha county for sale in the fall of 1877. He also avers that \$700.00 was a full price for the lot, at the time it was sold, in November, 1876. The respondent then proceeds to discuss the rise and fall of real estate in the city of Charleston its causes and consequences. He alleges, that said lot in 1873 was assessed on the land-books at \$178.00, and in 1875 at \$400.00; that the lot at the time of the sale was low and wet, and that in 1881 he constructed a subterranean drain, at considerable expense, the entire length of said lot, about 133 feet, and had dirt hauled, and filled up said lot, thereby adding greatly to its value; that in October, 1881, the plaintiff's agent or attorney accosted the respondent on the street and asked him for how much he would discount the judgment, which he held against plaintiff under the decree of December 20, 1876; that he declined, inasmuch as he was a fiduciary, to discount said judgment, and a few days afterwards, on the 28th of October, 1881, said Walker voluntarily paid to respondent the whole of said judgment, thereby acquiescing in and admitting the validity not only of said decree but of all the proceedings leading to the same. He also avers, that owing to many causes, which he enumerates, said lot has greatly enhanced in value, and for this reason, he alleges, the plaintiff has set up his claim. He denies, that he was acting as the agent of plaintiff in making said sale, and claims, that he was acting as the agent of the County Court, and that if said Walker was wronged by the court he should have excepted to its action, and his remedy would have been by appeal. In conclusion he denies, that he has been guilty of any legal fraud; that if there was any error it was merely

one of form,—a technical and not a substantial one; that he was the holder without interest of a naked legal title for and in behalf of the heirs of Maria McFarland; that, if there was any legal fraud, the plaintiff has waived and lost his right to be heard in a court of equity by reason of his gross laches and negligence for nearly ten years; that plaintiff is estopped from setting up any claim to said lot by silently standing by and permitting respondent to expend money in making improvements on said lot and by voluntarily performing the judgment awarded to plaintiff by the final decree confirming the sale of said lot; that plaintiff's only remedy was by appeal, which was barred in five years, *etc.*

Upon this state of pleadings said cause came on to be heard on the 7th day of July, 1888, upon the depositions taken in the cause and the general replications to said answers; and upon consideration thereof the court below held, that the plaintiff was entitled to the relief prayed for and decreed, that the sale of said lot made in the suit of D. L. Ruffner, administrator of Maria MacFarland, against Henry S. Walker and others, lately pending in the County Court of Kanawha county on the chancery side thereof by special commissioner D. L. Ruffner on the 27th day of November, 1876, and also the decree of the 20th of December, 1876, confirming said sale, and also the deed made to said purchaser by W. A. Quarrier, special commissioner, dated December 20, 1876, be, and the same are all hereby set aside, vacated, and annulled, and that the plaintiff be allowed to pay the purchase-money due from him on said lot to the parties thereto entitled together with the taxes, which had been paid by the purchasers on said lots, and the costs of the permanent improvements made by them thereon, less the rents received by them therefrom; and that said cause be referred to a commissioner to ascertain and report (1) the amount of purchase-money due from the said plaintiff on said lot, and to whom due; (2) the taxes which have been paid by the purchasers thereon with interest; (3) the cost and value of any permanent improvements made by the purchasers on said lot with interest; (4) the rents and profits received by the purchasers from said lot with interest, *etc.*

From this decree the defendants in said chancery suit,

with the exception of the Charleston Institute, obtained an appeal to this court.

It seems to be conceded on all hands, that David L. Ruffner, who, as administrator of the estate of Maria McFarland deceased, was the plaintiff in said chancery suit, which was prosecuted in the County Court of Kanawha county, was the same David L. Ruffner, who was appointed to make sale of said lot of land in the bill mentioned, and who at said sale became the purchaser of the greater portion of said lot in the same capacity, as that in which he acted when prosecuting said suit. It is contended by counsel for the appellee, that such a sale is not simply voidable but absolutely void. I do not however consider that position to be in accord with the weight of authority either in the state of Virginia or in this state.

In the case of *Howery v. Helm*, 20 Gratt. 1, the second point of the syllabus reads as follows: "When the commissioner appointed by a decree in a partition suit to sell the land becomes himself the purchaser, the purchase is voidable at the election of any party interested in the land sold. And the law is the same where the purchase is made nominally by a third person, who is reported by the commissioner to the court as the purchaser, but who really purchased for the commissioner, and conveyed the land to him accordingly, after the purchase, as reported, had been confirmed. * * *

* The commissioner by purchasing at his own sale did an act, which a court of equity treats as a fraud upon the parties interested."

In the case of *Newcomb v. Brooks*, 16 W. Va. 82 the court held as follows: "2. A purchase by a fiduciary, while actually holding a fiduciary relation, of the trust property, either of himself, or of the party to whom he holds such fiduciary relation, is voidable at the option of the party to whom he stands in such a relation, although the fiduciary may have given an adequate price for the property, and gained no advantage whatever." * * *

"10. But when such sales are sought to be avoided, the suit for the purpose must be brought in a reasonable time, though the property remains in the hands of the fiduciary." GREEN, J., in delivering the opinion of the court in that case, (page 69,)

says: "The general rule we have laid down, that a fiduciary will not be permitted to buy the trust property, even when the purchase is fair, and the price adequate, and that the *cestui que trust*, or person bearing a similar relation, may, at his option, set aside such a sale, applies as strongly to a public sale by a fiduciary as to a private sale; nor will the fact that the sale is made under an adverse proceeding, and at a judicial sale, make any difference. He can with no more propriety purchase at such a sale than at one made by himself." (Quoting numerous authorities.) "The reason of this is obvious, for if the purchaser bears such a relation to the person interested in the property to be sold as to impose on him the duty of making the property bring the highest price possible, this duty is as incumbent on him when the property is sold under an order of the court, or by any other person, or at any other sale, as it is when made by himself, either privately or publicly, and therefore he can not be permitted to put himself in a position in which it is his interest that the property should bring the least sum possible."

In the case of *Winans v. Winans*, 22 W. Va. 678, it is held: "When a commissioner appointed by a decree, in a suit in equity to sell land, becomes himself the purchaser, the purchase is voidable at the election of any party interested in the land sold."

In the case of *Ayers v. Blair*, 26 W. Va. 559, it is held: "That the same person can not occupy the antagonistic positions of seller and purchaser of the same subject," *etc.*

From these authorities and many others that might be referred to, the law seems clear, that a sale made, as this one was, by a special commissioner, who became the purchaser of a large portion of the property sold at his own sale, is clearly voidable in a court of equity. Upon that question I have arrived at my conclusions with very little hesitation; but there is another question in this cause, which is involved in more serious difficulty, and that is whether the plaintiff in this cause has not been guilty of such laches in the assertion of his demands, that what he might once have obtained without hesitancy from the court, has by the lapse of time, the change of circumstances, the alteration and enhancement in value of the property sold, and the death of one of the

purchasers, a party to the suit, been brought within that rule of equity which prevails in that class of cases "involving the specific execution or rescission of contracts for fraud, or some infirmity or defect, of which the plaintiff was fully apprised, but refused to act, until subsequent events showed, that it might be to his advantage to act; cases in which he was silent when it was his duty to have spoken or acted and will not be heard, when he should be silent."

The appellee, Walker, in his bill offers no excuse whatever for his delay of nearly ten years in instituting his suit to set aside the sale made by said Ruffner and the deed made in pursuance thereof. He was a party to the suit, in which said sale was made, and was fully cognizant of the fact, that said Ruffner had been appointed a special commissioner to make said sale, and when the property was exposed for sale, the sale seems to have been postponed on three different occasions,—once at least by the request of said Walker to suit his convenience; and the decree, which confirmed said sale, and gave a judgment over against said Walker for \$382.40, the balance of the debt due said Ruffner, as administrator, on the original purchase-money of said lot, which he afterwards voluntarily paid, also directed William A. Quarrier, as special commissioner, to make a deed to said Ruffner, as administrator, for the largest portion of said lot. Said Walker by paying said judgment thus performed and acquiesced in a part of the decree, which estops him from saying, that he did not have full notice of the said decree and its contents. At the time of said sale and for some time thereafter said lot was low and wet; and Dr. Wagner, who attended said sale for the purpose of bidding on the lot but was unwilling to bid more than \$500.00, although the lot adjoined his residence, says the property is now worth \$60.00 a front foot, or about \$4,000.00. Other witnesses say that \$700.00 was a fair price for the lot at the time it was sold. The evidence shows, that the property has been improved by ditching and filling, and its enhancement in value has been occasioned also by many causes, which have increased the value of property in the city of Charleston, and by the erection of the United States custom-house, and other buildings in the immediate vicinity, of which the said Walker re-

siding in said city had full notice. In addition to these facts Benjamin H. Smith, who was a purchaser of a portion of said lot at said sale, about the time of or shortly after the institution of this suit departed this life having devised the portion of said lot purchased at the sale by him to Caroline Q. Smith, Harry B. Smith, Alexander Q. Smith, Elsie, Isaac N., and Christopher T.,—the last three being infants,—as a part of his real estate; and, if said sale should be set aside, it would necessarily be set aside entirely, thus disarranging the final disposition made by said B. H. Smith of his real estate, which would have been avoided but for the delays of said Walker in instituting his suit.

In the case of *Trader v. Jarvis*, 23 W. Va., this Court, on page 108, says: "Delay in the assertion of a right, unless satisfactorily explained, even where it does not constitute a positive statutory bar, operates in a court of equity as an evidence of assent, acquiescence, or waiver, and especially is such the rule in suits to set aside transactions on account of fraud or infancy. A court of equity, which is never active in relief against stale demands, will always refuse relief where the party has slept upon his right, and acquiesced, for a great length of time. Nothing can call into activity this court but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced,"—referring to *Smith v. Clay*, 2 Amb. 645; *Doggett v. Helm*, 17 Gratt. 96.

In the case of *Pusey vs. Gardner*, 21 W. Va. 470, sixth point of syllabus, this court holds: "Even where there is no absolute bar from the lapse of time or by the statute of limitations, it is a principle of courts of equity not to take cognizance of an equitable claim after a great lapse of time, and where, from the death of parties and witnesses, there is danger of doing injustice, and there can no longer be a safe determination of the controversy."

In the case of *Harwood v. Railroad Co.*, 17 Wall. 81, upon a bill filed to set aside as fraudulent completed judicial proceedings regular on their face, the court says, Justice HUNT delivering the opinion: "We are of the opinion, also, that there has been too great delay in initiating this suit, and that

no sufficient excuse is given for it. The sale was made five years before the commencement of this suit, and it is fairly to be inferred from the bill that the plaintiffs were aware of the proceedings as they progressed. Their knowledge of the mortgage sale is expressly admitted. * * * They do not allege when they acquired the knowledge, nor give a satisfactory reason why it was not sooner obtained. For aught that appears, they have slept upon their knowledge for several years. Without reference to any statute of limitations, the courts have adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case. This case does not show a sufficient degree of diligence to justify the overthrow of a decree of foreclosure, under which new rights and interests must have arisen."

When said sale was made in November, 1876, neither the plaintiff, Walker, nor any one for him seemed disposed to bid upon the said lot, although the most ample opportunity was afforded him; and after repeated efforts were made to make sale of said lot, B. H. Smith and the representative of the estate of Maria McFarland, who held the vendor's lien upon said lot, concluded to invest in the same in proportion to the amounts respectively held by them as liens thereon, and, to effect that purpose, bid in the property at \$700.00, which, the proof shows, was a fair price at the time of the sale. If said sale was fraudulent and void, the facts, which made it so, existed in December, 1876, when it was confirmed without exception or objection on the part of plaintiff, who was before the court with full knowledge of the entire proceeding. If he had spoken then or within a reasonable time thereafter, instead of waiting until February, 1887, to file his bill, a court of equity would have lent a willing ear to his complaint; but under all the circumstances disclosed by the record and the evidence in this cause I am of the opinion, that after so much delay and so many changes it was error in the court below to entertain the plaintiff's bill or decree in his favor.

The decree complained of must be reversed, and the bill dismissed, and the appellee must pay the costs of this appeal and the costs of the Circuit Court.

REVERSED. DISMISSED.

CHARLESTON.

BUSHONG v. RECTOR.

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*(GREEN, JUDGE, Absent.)

Submitted January 22, 1889.—Decided March 4, 1889.

1. HUSBAND AND WIFE—SEPARATE ESTATE—EJECTMENT—PARTIES—WRIT OF POSSESSION.

A wife living with her husband on land, which she claims as her separate estate under a right derived from a person other than her husband prior to commencement of the action, can not be turned out of possession by a writ of possession in an action of ejectment against her husband, to which she was not a party. In such case she is as to her claim a person distinct from her husband and must be made a party to the action like any other person, in order to bind her by the judgment.

2. HUSBAND AND WIFE—WRIT OF POSSESSION—EQUITY—JURISDICTION—INJUNCTION.

In such a case equity has jurisdiction by injunction to restrain the execution of the writ of possession as to her. The parties will be left without prejudice from the decree to test their titles at law.

R. H. Smith for appellant.

J. A. Hutchinson for appellee.

BRANNON, JUDGE :

In July, 1882, Enoch Rector brought an action of ejectment in the Circuit Court of Wood county against Daniel Bushong and O. M. Bushong for 100 acres and thirty one poles of land and in November, 1883, recovered judgment and issued a writ of possession, when Elizabeth Bushong obtained an injunction against the enforcement of the writ as to her. Rector answered the bill denying plaintiff's right, and depositions of numerous witnesses were taken, and the court dissolved the injunction and dismissed the bill, reserving right to Elizabeth Bushong to defend or prosecute any right or claim, which she might have relative to the land, in any proceedings at law.

*On account of illness.

The record shows, that by deed of May 21, 1880, one Peter Curry conveyed the land to Elizabeth Bushong, who is the wife of O. M. Bushong, which deed was recorded June 3, 1881; and it also shows a deed dated February 16, 1874, recorded April 25, 1882, from Daniel Bushong to Rector. Daniel Bushong was in possession though not under any title, so far as appears, eight years, before he made the deed to Rector in 1874. The land had belonged to an oil-company, which suspended operations and abandoned the land, and Bushong simply took possession of it, as if there was no owner. Rector was owner of \$2,000.00 stock in the oil-company, and set up a claim to the land on that account, and sought possession in order to thereby obtain title, as he says. Upon his conveyance to Rector Daniel Bushong took a lease for one year in writing from Rector and continued in possession under a verbal arrangement afterward. He was to pay taxes and did so for five years, (1867 to 1871,) and handed over to Rector the tax-receipts, which he files in the name of J. S. Hoffman for part of the time, and of Imperial & Kanawha Oil Company for part of the time.

O. M. Bushong is a son of Daniel and was living with his father on the land, when he married the plaintiff, Elizabeth Bushong, and he states, that he and his wife lived there from 1869. He states that Daniel turned over possessions to his wife and himself in 1870, in consideration that they were to support Daniel and his wife. Elizabeth Bushong in one deposition states, that she had been in possession since 1870, and when asked who put her in possession, answered, that Daniel Bushong did under agreement by her to keep him and his wife; and in another deposition she stated, that Peter Curry put her in possession, and also that Daniel Bushong put her in possession, in consideration that she would keep him and his wife during life, and that under her agreement she had kept Daniel until his death, and was still keeping his wife. The evidence shows, that O. M. Bushong recognized himself as a tenant of Rector, though later he repudiated it to Rector, and then he sued.

Elizabeth Bushong appeals here for relief against the decree of the Circuit Court.

The plaintiff complains, that she is to be turned out of

house and home by a writ of possession upon a judgment in ejectment, to which she was not a party. Herman on Executions, 530, says : "Under this writ it is the duty of the sheriff to remove all persons from the premises described in the writ, and all goods and property that may be thereon. The plaintiff must be put into full and complete possession of the premises." Properly understood, this is good law, but we must not be misled by its generality. The writ is only to execute the judgment and can go no further than the judgment; and this statement must be taken subject to the general rule, that a judgment does not bind strangers to it.

Freeman on Executions, § 475, lays down the law thus : "The defendant and all the members of his family, together with his servants, employes and his tenants at sufferance may be removed from the premises in executing a writ of possession. It has even been held that the defendant's wife must be removed, although she was not a party to the suit, and claimed the premises as her separate estate. Notwithstanding this decision, we doubt whether a wife, or any other member of the defendant's family not a party to the suit, can lawfully be dispossessed of his or her separate estate, unless possession was acquired by them after the institution of the action. No person in possession of the premises, claiming title thereto at the commencement of the action, can be dispossessed, unless he was made a party to the suit, so as to be bound by the judgment; nor can the tenants or agents of such person be lawfully removed, although their entry was subsequent to the institution of the action. On the other hand, all persons acquiring possession from and under the defendant or defendants, during the pendency of the action, whether as vendees, lessees or otherwise, are bound by the judgment, and should be removed under the writ. Persons acquiring possession of the defendant prior to the suit can not be dispossessed, unless they were made parties defendant. All persons entering upon the possession of the property *pendente lite* are presumed to have entered under the defendant, and *prima facie* are liable to be turned out by the writ. It is obvious that the temptation to render the plaintiff's action fruitless by turning over the possession to one not a party to the suit is very great. All courts will exercise great caution

in considering the right of a person to retain possession after the judgment, when it is clear that he entered *pendente lite*. His right will always be denied, unless it is clear that he did not enter under the defendant, nor by any collusion with him. Mere tricks and devices to rob the plaintiff of the result of his litigation will not be encouraged. But, if it clearly appears that any person has entered subsequently to the institution of the suit, not under the defendant but in his own right, claiming adversely to the defendant, then the officer can not lawfully dispossess such person."

The Code of 1887 c. 90, s. 35 provides, that a judgment in ejectment "shall be conclusive as to the right of possession established in such action upon the party, against whom it is rendered, and against all persons claiming from, through or under such party by title accruing after the commencement of such action." It does not affect persons not parties claiming by title existing before the action, nor any one not claiming by, through or under the defendant, a stranger in title to the defendant in the action. Law and reason and justice declare this. And a wife is as to her separate estate a stranger to her husband,—a wholly distinct person. Our statute giving her capacity to take and hold property as her separate estate, as if she were a single woman, has as to such property dissolved the unity of person of man and wife, which existed at the common law. Code s. 6, c. 66.

Now suppose Elizabeth Bushong to be in possession under a contract with Daniel Bushong. That contract though with the defendant was made long before the commencement of the action, and under the law above cited her right to possession under it could not be affected by the action. Then suppose her in possession under her deed from Curry. Her title under it was both before the commencement of the action and not under the defendant but by a distinct claim, and it could not be affected by the action. Before the suit she was living on the land with her deed in her pocket conferring a separate estate or claim thereto; and the fact, that she was living with her husband, though he were Rector's tenant, would not render her any the less in the possession for the purposes of this case; her possession was sufficiently actual to protect her from ouster by the writ. If a son had had a

title to the land distinct from his father, could he have been thrown out under the judgment, to which he was no party? No more could the wife; for as to her separate estate she is just as distinct a person as the son.

The Pennsylvania case (*Johnson v. Fullerton*, 44 Pa. St. 466) criticised above by Freeman is not supported by other cases and is illogical in view of the entire separation of the wife from the husband as to separate estate. Before binding her by a judgment she ought to have an opportunity to defend her property and be given a day in court, and ought not to be precluded on the ground taken by the Pennsylvania case, that her husband should have defended on her right. And it is not consonant with the principles stated by Judge Woods in *Hughes v. Mount*, 23 W. Va. 130, which, I think, substantially rule this case. In that case Mount and his wife lived on the land, he as tenant of Hughes and Murphy, she having deeds from other parties. Hughes and Murphy recovered against the husband a judgment in unlawful detainer, and under a writ of possession in it turned husband and wife out. She, finding no one in the house, re-entered into possession, and was sued in unlawful entry and detainer. Judge Woods says that the position of the plaintiffs assumed that the wife re-entered unlawfully and forcibly, and that before the writ was executed possession was not in the defendant, but in her husband, and that by executing the writ against him the possession of the wife, if any she had, was divested and transferred to the plaintiff. This assumption he did not sustain. He said the questions whether she had a separate estate, and was entitled to the possession, were questions to be considered (in the second action of unlawful entry, as I understand it) in determining whether the writ, and all proceedings under it, were not, as to her, mere nullities, and whether the act of dispossessing her husband was not, as to her, mere lawlessness, not depriving her of her right to reclaim her property by the right of lawful re-entry.

He further said: "If, as the defendant claims, it be true that the land belonged to her in fee-simple as her separate estate, then said B. F. Mount had no interest therein, and the plaintiffs by the deed from Commissioner Sands acquired

no title thereto. If said land, at the time of said sale under said decree to plaintiffs, so belonged to defendant, B. F. Mount could neither sell nor lease the same, or do any other act to deprive her of the possession and enjoyment of said land without her consent. If, under such circumstances, her husband undertook to lease her land from a stranger, he could acquire no possession by the lease, nor could he, at the expiration of his lease, surrender to his pretended landlord a possession which he has never acquired, nor could the landlord recover from him a possession he never had, and which he never transferred to his tenant. Whether such a state of facts exists or not are questions of title to be determined at the trial. It is true that if a husband should undertake to lease a wife's land from a stranger, that he could not resist his landlord's action, but it will scarcely be contended that the judgment recovered against him could be satisfied out of his wife's land, or that it could confer upon him any right to the possession thereof."

So I hold, that, whether Mrs. Bushong's title was good or bad, whether it was better or worse than Rector's, whether he or she was entitled to the sole possession, are questions to be tried in a proper proceeding, and her right and her actual possession are not to be dissipated by a writ of possession against another, an absolute nullity as to her, but she is entitled to a day in court to have her rights weighed in the balance of the law and passed on by due process of law by trial and judgment. The law gives her an advantage in an action of ejectment as one in possession, which she can only lose by due legal process. Rector must bring an action against her, she being in possession.

Appellee's counsel urges, that the appellant's deed from Curry is trumped up with fraudulent intent as the work of a conspiracy to defeat the plaintiff's action. The answer is, that, before the action began, she was on the land by a deed dated, acknowledged and recorded before the action. If it had been executed after the action began, there might be force in the claim, that it was born but to defeat the fruit of the action,—we might consider, whether such was its purpose; but I fail to see how we can consider this matter, seeing that her possession and claim, be it good or bad, existed

before the action. How can it be said it was originated to defeat an action not in being? I quote at this point Freeman's text: "No person in possession claiming title at the commencement of the action can be dispossessed unless made a party to the suit." If next it be said that the plaintiff's claim was conceived in fraud, to defeat not the action of Rector but his title, and to secure the land from one, who had no title, Curry, (but what his right was does not appear,) I respond. That is a question, whatever be the effect of it if true, to be determined in a suit, to which plaintiff and defendant are parties. Therein the rights of the parties may be heard. This is but an injunction obtained by a wife to save her from expulsion from her home under a writ of possession against her husband in an action, to which she was not a party, she not being therein simply and only as a wife but having a claim to the land independent of her husband; and we hold with her on the fact, that she was no party to the action, leaving the titles of plaintiff and defendant to be litigated in another proceeding without prejudice from the court's decree in this case.

I do not see, that the principle of estoppel urged by appellee, by which a tenant and those claiming under him are hindered from denying the landlord's title, as expounded in *Emerick v. Tavener*, 9 Gratt. 230, applies to this case. Tavener leased land to Emerick, and afterwards Emerick conveyed a portion to Alton. It was held that in an action by Tavener against Emerick and Alton not only was Emerick estopped from setting up title against Tavener, until he restored possession or disclaimed to hold as tenant and brought home to Tavener notice of his disclaimer, but further that Alton by entering as purchaser from Emerick became subject to the same relations held by Emerick to Tavener, and neither could set up adverse title. But there Alton entered under a conveyance from the tenant, claimed under him; here Mrs. Bushong claims under not her husband but Curry. As far as her claiming under Daniel Bushong is concerned, so far as the evidence shows, the date of his giving her or her and her husband, which ever it be the possession under agreement to keep Daniel and his wife, was in 1870, and Daniel did not become Rector's tenant till 1874, and her

right and possession under Daniel, as it existed before his lease of Rector, would remain so after that lease, and not fall under the principle of *Emerick v. Tavenor*, because earlier in date; and her continuing there afterwards could not change the state of things existing before; and the fact, that she was on the land as Bushong's wife living with his father does not make her a subtenant, or put her in a condition, which would forbid her from acquiring from another a hostile title. It would make her a member of his family and liable to go off under the writ, if she had no separate claim, but it would not establish a relation of landlord and tenant.

The case cited by appellee's counsel (*Higginbotham v. Higginbotham*, 10 B. Mon. 369) does not apply. Sally Clarke, as the judge there says, merely resided with the defendant by his permission without any interest in or title to the premises,—a part of his family,—and as such the writ authorized the sheriff to turn her out.

Mattox v. Helm, 5 Litt. 186, does not apply, because the parties there in question entered without title under Elliott, the defendant, and the court said they were mere tenants at will under Elliott having no fixed right or term and were liable to go out, no matter when they entered. This is consistent with the rule as stated by Freeman, that a writ of possession would turn out mere tenants by sufferance of the defendant in the writ.

Sinclair v. Worthy, 84 Amr. Dec. 357, was a mere refusal of the court to stay a writ of possession on the suggestion that title was in some one else. It does not apply here. That an injunction will lie to enjoin expulsion from one's home under a writ of possession against one not a party to it is, we think, clear. *Goodnough v. Sheppard*, 28 Ill. 81; *Stewart v. Lavender*, 30 Ark. 594; *Herm. Ex'ns*, 615.

The decree of the Circuit Court is reversed, and the injunction as prayed for in the bill must be perpetuated with costs to Elizabeth Bushong in both courts, without prejudice from this decree to the parties from asserting any title to the land, which they may have, in any other suit.

REVERSED.

CHARLESTON

CONNELL v. CONNELL.

*(GREEN, JUDGE, absent.)

Submitted January 26, 1889.—Decided March 4, 1889.

1. DEED—ESCROW.

Where a deed is delivered by the grantor to a third person to be held in escrow until the grantee shall have paid a specified debt, and the deed is delivered before the debt is fully paid, but it is subsequently paid, *held*: the delivery will be operative, and the deed valid, at least from the time the debt is fully paid.

2. DEED—ESCROW—ACQUIESCENCE—NOTICE—LACHES.

Where those to be effected by the improper delivery and recordation of a deed were fully acquainted with the facts, and acquiesced therein for an unreasonable time, and until the rights of third parties have intervened, they will not be permitted to avoid such deed.

3. NOTICE.

A case in which the trustee and *cestui que trust* are held to be purchasers for value without notice under the evidence and special facts and circumstances proven.

4. NOTICE.

To charge a *bona fide* purchaser with notice, either express or implied, the notice must be something more than a vague statement that the vendor's title is subject to an equity.

Statement of the case by SNYDER, PRESIDENT:

John H. Connell on October 7, 1886, filed his bill in the Circuit Court of Kanawha county against Daniel F. Connell, Roman Pickens and W. S. Laidley, trustee, in which he avers, that in the year 1865 he contracted to purchase from Davis H. Estill a house and lot on Quarrier street in the city of Charleston at the price of \$2,000.00, of which sum he paid about \$500.00 and, in order to get the title from Estill, his father, J. S. Connell, raised a balance the \$1,500.00 by borrowing the same from D. F. Connell, to whom he gave his note therefor dated April 1, 1865; and that there-

*On account of illness.

upon Estill conveyed the lot to said J. S. Connell upon the agreement between the said J. S., Daniel and the plaintiff, that said J. S., the father of Daniel and the plaintiff, was to hold the legal title to said house and lot as security to Daniel for said \$1,500.00 until paid, but in trust for the plaintiff for any surplus in case of a sale to pay said \$1,500.00. The plaintiff went into possession of the property about that time and has resided upon it ever since. A year or two before the death of his father the said D. F. Connell requested, that the said house and lot be deeded to him with the same trust and understanding, that he should hold the title as security for said \$1,500.00, and with this understanding the father executed and acknowledged a deed to Daniel for the property and delivered it to his daughter, Sarah, to keep until a full settlement of accounts was had between him, Daniel, and the plaintiff. The father died leaving the deed in the possession of his daughter; and five or six weeks thereafter Daniel got it from her and had it recorded, but still admitting, that he held the property as security for the money loaned, or any balance there might be due him on settlement, and such has always been the understanding; and that on such settlement and the payment to Daniel of any balance found due him the property was to be conveyed to the plaintiff free from any claim of Daniel. No such settlement has ever been made, though efforts to do so have been made without effect. Plaintiff believes that upon a fair settlement between him and Daniel there will be due to him a sum sufficient to pay any balance that may be due to Daniel on said \$1,500.00; that said Daniel is not therefore the true owner of said house and lot, but only the holder of the legal title in trust as aforesaid. The plaintiff further avers, that D. F. Connell by deed dated August 29, 1884, conveyed said house and lot and another lot of nine acres of land worth \$2,800.00 to W. S. Laidley, trustee, to secure to Roman Pickens the payment of a note of \$3,000.00 which is now due, and said Laidley has advertised the property for sale under said trust-deed; that said house and lot are worth \$5,000.00 and, if sold as advertised, would be sacrificed; that the Ruffner Bros., as agents of Pickens, loaned said \$3,000.00 to D. F.

Connell for Pickens, and the plaintiff gave them notice, that said D. F. Connell did not own said property.

The bill prays that W. S. Laidley, trustee, be enjoined from selling said house and lot; that all proper accounts be ordered and taken; and that said D. F. Connell be required to surrender such title as he holds to said house and lot, and convey the same to the plaintiff *etc.* The injunction was awarded as prayed in said bill.

The defendant Pickens answered denying the allegations of the bill, and especially denying, that Ruffner Bros. had ever been his agents, or that they had made the loan to D. F. Connell for him; or that the deed from J. S. Connell to D. F. Connell had never been delivered; or that the said house and lot had been conveyed to D. F. Connell upon any trust secret or otherwise; or that, if such trust existed, he had any notice of it; and averring, that he was a purchaser for value without notice; and he also denied all the other material allegations of the bill.

Subsequently the plaintiff filed an amended bill, the time of filing which is not disclosed by the record, but, as it appears to have been sworn to on July 2, 1887, it was probably filed after the depositions had been taken and filed. In this amended bill the plaintiff avers by way of supplement, that W. S. Laidley, trustee, before the trust-deed to him was executed, had notice and was advised of the equities of the plaintiff in said house and lot; and he was informed that D. F. Connell was not the true owner thereof; and also that since the filing of his original bill the plaintiff has been informed and now distinctly charges, that the legal title to said house and lot never vested in D. F. Connell; that the deed thereto from J. S. Connell was never delivered either by said J. S. Connell during his life, or by any one authorized to do so after his death; but that after the death of said J. S. the said D. F. Connell wrongfully obtained the possession thereof from his sister, Sarah E. Connell and improperly had the same recorded; that the said deed is null and void, and the legal title to said property is vested in the heirs of said J. S. Connell, deceased, for the use of the plaintiff as the real and true owner subject to a charge in favor of D. F. Connell for any balance due on the purchase-money advanced by him

after a full settlement between him and the plaintiff. There is no prayer to this bill.

Pickens answered this bill also ; and all the other defendants filed their separate answers to the plaintiff's bill and amended bill. D. F. Connell after detailing the transactions and state of accounts and settlements between himself and the plaintiff and exhibiting papers signed by the plaintiff, which show, that the plaintiff is largely indebted to him over and above the \$1,500.00 advanced for the purchase of the house and lot, avers, that in the year 1868, after the plaintiff had sold a part of the aforesaid lot for \$450.00 the said J. S. Connell offered to convey the residue thereof to the respondent upon the surrender to him of the note held by respondent for the purchase-money, amounting then to \$1,790.00. Respondent accepted this offer and delivered to his father the said note, and his father agreed to convey to him said lot. Not long after this his father died, and shortly thereafter the said deed was delivered to him by a member of the family, and he with the full knowledge and consent of the plaintiff and the other heirs of his father had it recorded, and he has ever since claimed and owned said property thereunder without notice or knowledge of any adverse claim until after the execution of the aforesaid trust-deed to W. S. Laidley, trustee ; and he positively denies, that the plaintiff has any right or title to said house and lot either legal or equitable.

The defendant, W. S. Laidley, in his answer, which is sworn to by him, says : "As to the allegation, that this trustee was notified before the loan mentioned was made, and before the deed of trust was executed, of the plaintiff's equities as set out in said bill, this respondent remembers nothing whatever * * * and he does not remember of having any consultation with J. H. Connell before the deed was written, or with any one else." He further says he sold the nine acres of land mentioned in the trust-deed on October 9, 1886, for \$1,165.00.

All the answers were replied to generally. On April 9, 1886, the cause was finally heard on the bill, and amended bill, the demurrer thereto, the answers of all the defendants, replications, exhibits and depositions ; and thereupon the

court entered a decree dissolving the injunction and dismissing the bill, at the plaintiff's costs.

From this decree the plaintiff has appealed.

E. B. Knight and *J. H. Connell* for appellant.

Brown & Jackson and *W. A. McCorkle* for appellees.

SNYDER, PRESIDENT :

If the deed from J. S. to D. F. Connell vested in the latter the legal title to the house and lot, and the appellees Roman Pickens, and W. S. Laidley, trustee, are purchasers of the property without notice of any equity or right thereto in the plaintiff, then it is wholly irrelevant to inquire in this cause as to the equities between the plaintiff and D. F. Connell in respect to said property, or as to the state of accounts between them. I shall therefore address myself to the following questions :—1. Was D. F. Connell vested with the legal title to said house and lot by the deed to him from J. S. Connell, or otherwise?—2. Were the appellees Pickens and Laidley purchasers without notice of any equity in the plaintiff in respect to said property?

1. The record shows that this property was in the year 1865 conveyed by D. H. Estill to J. S. Connell. On July 9, 1868, J. S. Connell and wife had a deed prepared, absolute on its face conveying said property with covenant of general warranty to D. F. Connell in consideration of \$2,500.00, the payment of which is therein acknowledged, which deed was on July 10, 1868, duly acknowledged by the grantors for record. The only evidence in respect to the delivery of this deed is that of Sarah E. Connell, the daughter of the grantor. She testifies, that her father delivered to her this deed and told her, that it was a deed he had made to D. F. Connell for J. H. Connell's house, and that he did not intend delivering it yet. She put it away and kept it, until after her father died. She did not know what to do with it. She mentioned the matter to her brother Daniel, and he told her to give it to him, which she did. On cross-examination she says her father told her it was a deed, that he had made to D. F. Connell on condition, that he would pay a certain debt, that her father was security for, and that he had noth-

ing but D. F. Connell's word for it, and he was not going to deliver up the deed, until D. F. Connell fulfilled the conditions. So far as she can remember, the debt referred to was the Babbitt & Good debt. Other testimony in the cause shows that this deed was prepared by the plaintiff, J. H. Connell, and that the Babbitt & Good debt has been paid, though a part of it was paid by D. F. Connell, after the deed had been delivered to him. J. S. Connell died September 24, 1869.

D. F. Connell at the time resided in Ohio, and on his coming to Charleston soon after his father's death the deed was delivered to him, and he had it duly recorded in Kanawha county on November 10, 1869. The property has ever since been on the tax-books of the county in the name of D. F. Connell, and he has paid the taxes thereon. Not only the plaintiff but also the other children and heirs of J. S. Connell, knew that said deed had been delivered to Daniel, and that he claimed the property as his own; and none of them, so far as the record shows, ever questioned the delivery or validity of said deed. In a letter written by the plaintiff to Daniel on November 10, 1868, a few months after said deed had been written by him, he says: "I was applied to to-day to know if my house was for sale, and what the price was. I informed the party that I had let you have it, and that your price was \$3,000.00."

I think this evidence sufficient to prove, that said deed was properly delivered to D. F. Connell. If it was delivered upon any condition, it must have been upon the payment of the Babbitt & Good debt; and, whether that debt was paid before or after the delivery of the deed, the delivery would certainly be operative, and the deed valid, from the time the debt was in fact paid. 3 Washb. Real Prop. 313, 328. But further the plaintiff is estopped at this late day from denying the validity of said deed. He had full notice for nearly eighteen years, that said deed was upon the public records of the county, and he not only took no action to set it aside but never questioned its validity, until the property passed into the hands of a purchaser from his brother. Delay in the assertion of a right, unless satisfactorily explained, operates in equity as evidence of assent, acquiescence or waiver; and

this rule applies with peculiar force, when the attempt is made to impeach a transaction like the one now in question. *Trader v. Jarvis*, 23 W. Va. 100; *Doggett v. Helm*, 17 Gratt. 96; *Evans' Appeal*, 81 Pa. St. 302; *Hayward v. Bank*, 96 U. S. 611.

2. We come now to the inquiry: Were Pickens and the trustee, Laidley, purchasers without notice? The plaintiff in his original bill does not allege or claim, that Laidley had notice. In that bill the only allegation of notice is, that the plaintiff gave notice to Ruffner Bros., the agents of Pickens, who loaned the money to D. F. Connell. The first claim which we have from the plaintiff of any notice to Laidley is in the amended bill, which was evidently filed after the depositions of the Ruffners had been taken denying, that they were the agents of Pickens. This fact is significant; for if the plaintiff went to Laidley, as he claims, to notify him of his equities, it is not likely he would have omitted that important fact from his original bill.

The plaintiff in his deposition, taken after the depositions of Pickens and Ruffners had been filed, says, that he never had any conversation with Pickens previous to the loan in reference to it and knew nothing of it until about August, 1886. He further says, that, before the loan was made, he was informed, that his brother was negotiating with Pickens through the Ruffner Bros. for a loan of \$3,000.00 and that his brother had gone away in a hurry and wanted him to give Mr. Laidley any information he might want about the title to the property; that he then went immediately to the Ruffner Bros. "and told them about it and told them, that I claimed the property and was not willing for it." He further says: "I did not wait for Mr. Laidley to come and see me, but I went to see Mr. W. S. Laidley, trustee in the deed from D. F. Connell for Pickens, the same or the next day. I saw him at the clerk's office. I told him of my claim to the property, where I resided, there on Quarrier street. He remarked, that D. F. Connell had another property on Quarrier street. I told him, no; that he had sold that to Ham. Morris. This was some place between the 27th and last of August, I think, 1884." He further says, he had two or three conversations with Pickens, after the loan fell due, in

regard to the payment of the interest on it. In another part of his deposition the plaintiff says, that in 1879 his brother offered to give Polsley a trust-deed on this property, and that he told his brother "that he [I] would not object to his giving a lien on it to Polsley."

This is the whole of plaintiff's testimony in regard to the question of notice, and it is the only evidence on his behalf in the record. On the other hand we have the testimony of several witnesses, which tends either directly or indirectly to contradict the plaintiff, and to show, that Pickens was a purchaser without notice. The testimony of the Ruffner Bros. as well as that of Pickens himself clearly proves, that the Ruffners were not the agents of Pickens and had no concern or interest in the money loaned or the trust-deed. All that the record shows is, that at the time the loan was made Pickens had some money in the hands of Ruffner Bros., and upon inquiry of them by D. F. Connell they told him, that it was probable, he could borrow some money from Pickens. Connell then saw Pickens and obtained the loan, and Pickens give him an order on Ruffner Bros., and on that order they paid the money to Connell. This of course did not make Ruffner Bros. the agents of Pickens; and therefore, even if the plaintiff had given them notice of his claim to the house and lot, that would not be notice to Pickens or in any degree affect him as a *bona fide* purchaser.

The sole question therefore is: Did Laidley, the trustee, have notice? We have already seen, that Laidley in his sworn answer says, that he remembers nothing whatever of having any conversation with the plaintiff or notice of the plaintiff's equities, before the trust-deed was executed. D. F. Connell testifies, that he told Mr. Laidley to investigate the title and either give to him his deed for the property or referred him to the records for that purpose. Pickens testifies, that before the loan was made to D. F. Connell he had a conversation with the plaintiff on the subject; that the plaintiff appeared to be very anxious for his brother to get the money; and that "he did not apprise me at that time, that he had a claim against the property." And then, in answer to the question: "When did he first tell you, that he had any claim against this property?" says: "That was about six months ago,

may be a little longer, and may be not so long." This witness further testifies, that, after the loan had been made, he had several conversations with the plaintiff, and he said, that his brother was going to pay it; that the plaintiff never told him, he had any claim to the property, until the money become due, and he wanted the interest on it. He further says, that Laidley was not his retained counsel, and he does not remember, that he employed him to examine the title to the property.

It seems to me that this testimony and the facts and circumstances attending the transaction fully overcome the pretensions of the plaintiff, that he notified Laidley of his claim. It is not reasonable to suppose, if he had done so, that Laidley could have forgotten it; and it is altogether improbable, that with such notice Laidley would have passed the title and become the trustee in the trust-deed without informing Pickens; and still less probable, that Pickens, if informed of any defect in the title, would have made the loan upon such security. Pickens testifies positively, that he had a conversation with the plaintiff in respect to the matter, before the loan was effected, and that the plaintiff instead of objecting appeared to be very anxious for his brother to get the money. This is corroborated by the testimony of plaintiff, who admits, that he had no objection to his brother giving a trust-deed on this property to Polsley. From the whole testimony, facts and circumstances it seems to me to be apparent, that the plaintiff, at the time the loan was effected, made no objection and gave no notice of his claim to the property; but when the debt became due, and Pickens wanted his money, then for the first time he gave notice of his claim to the property. But, be this as it may, I am clearly of opinion, that the plaintiff has failed to establish the fact, that he gave such notice, or that either Pickens or Laidley had such knowledge, as ought to deprive them of the position and rights of purchasers for value without notice.

To charge a *bona fide* purchaser with notice either express or implied, the notice must be something more than a vague statement, that the vendor's title is subject to an equity. It must be such information as to bind the conscience of the purchaser. Wade, Notice, § 29. A court of equity will not be astute to charge a constructive trust upon one, who has

acted honestly and paid a full and fair consideration without notice or knowledge. *Wilson v. Wall*, 6 Wall. 83, 90; *Mundy v. Vawter*, 3 Gratt. 518.

Having arrived at this conclusion, it is unnecessary in this cause to determine or consider the question raised and discussed in respect to the controversy as between the plaintiff and the defendant D. F. Connell; and as to those questions we decide nothing. If the plaintiff has any rights or equities in the said property as against D. F. Connell or has any other demand or claim against said D. F. Connell, they are such as do not concern the other defendants in this cause; and they must therefore be settled in a suit between themselves.

For the reasons aforesaid the decree of the Circuit Court must be affirmed; but as a matter of precaution, though perhaps an unnecessary one, the said decree is affirmed without prejudice to the right of either the plaintiff or the defendant, D. F. Connell, to institute and prosecute any proper suit at law or in equity to settle any claim or equities between them in respect to the house and lot in the bill mentioned, or any other claims or accounts existing between them, which are referred to in the pleadings in this cause.

AFFIRMED.

29	398
39	648
32	328
64	124

CHARLESTON.

BRIDGE Co. v. PT. PLEASANT.

*(GREEN, JUDGE, absent.)

Submitted January 25, 1889.—Decided March 4, 1889.

1. TOWNS—CORPORATE LIMITS.

It is not necessary to the validity of an order of the Circuit Court under Code 1887, c. 47, s. 49, approving a change of the limits of a town, that the order show on its face, that the town contains less than 2,000 inhabitants.

*On account of illness.

2 TOWNS—CORPORATE LIMITS—TAXATION.

A town may under said chapter of the Code, extend its corporate limits so as to include a railroad bridge across the Ohio river and impose municipal taxes on such bridge. Such taxation is not *ultra vires*.

Gunn & Gibbons and *Tomlinson & Wiley* for appellant.

Knight & Couch and *W. A. Quarrier* for appellee.

BRANNON, JUDGE:

The Point Pleasant Bridge Company exhibited its bill in the Circuit Court of Mason county against the town of Point Pleasant complaining and stating, that the original corporation of said town in 1794 did not include the Ohio river; that the plaintiff as a corporation was owner of a railroad bridge across the Ohio situate entirely without the bounds of said town at the time of its construction except some of its approach; that immediately after its construction the town enlarged its limits so as to embrace therein all the river opposite the town to low-water mark on the Ohio shore and include all of the bridge, which was in West Virginia, as would appear from a copy of an order of the Circuit Court enlarging such limits, (*Davis v. Pt. Pleasant*, ante p. 289); and that the change in boundary so as to embrace the river was not made in good faith nor for improving the new territory in front of the town nor for legitimately benefiting the territory in the old charter but falsely and fraudulently for the transparent purpose of raising revenue on property out of the corporation, not in any way benefited or capable of receiving benefit from the change, so that the revenue might be used to improve property within the old charter; that the town had imposed and placed in the officer's hands for collection \$—— taxes for 1886, and \$253.63 for 1887.

Plaintiff averred: (1) The power to levy taxes by a town must be based on "benefits both actual and prospective conferred upon the taxed property rendering it not unreasonable, that the municipal government should be extended over it." (2) The bed of the Ohio river could not possibly be laid off into lots or streets, and the town had not the right, if it were possible to do so, to lay out the bed of the river into lots or to extend its streets into it, because it would ob-

struct navigation and appropriate the river to purposes, which were never intended; that the state of Virginia never parted to any one with title to the soil under the Ohio; plaintiff had acquired from West Virginia and the United States authority to build its bridge; defendant could not without the consent of the state extend its limits over land belonging to the state, nor tax a bridge on land belonging to the state. (3) The plaintiff could never use its right of way across the river as city-property, and could not receive any profit from it as such. (4) The town does not light the bridge and furnishes no police for its protection. (5) The taxation of the bridge was *ultra vires* not as required by law. (6) The extension was fraudulent and void. (7) In making the extension the town did not comply with the law, and the extension was void. (8) The order of court extending the town was not made till September 6, 1886, yet the town was collecting taxes for 1886.

The bill asked an injunction to restrain collection of the taxes and the vacation of the order of the 6th of September, 1886, extending the town. An injunction was granted. An amended bill charged, that the power to create, alter or amend a municipal charter was a high prerogative act of sovereignty; that the power to do so is vested in the Legislature except in the case of towns of less than 2,000 population, in which case the power is in the Circuit Court; and that, to render the order of the Circuit Court enlarging a town valid, there must be a judicial finding on the face of the order, that the town has less than 2,000 inhabitants, otherwise the order is void. It charged, that, as the order in this case had no such finding, it was void. A motion to dissolve the injunction was overruled.

The answer of the town alleged, that the Ohio river was within the bounds of the old charter. It denied, that the extension was made in bad faith for fraudulent purpose, as alleged in the bill. It denied all allegations of the bill, that the change was made only to collect taxes, and alleged, that the town had spent \$2,500.00 in improving streets beyond the limits of the old town leading to the depot, where passengers and freight are received to be carried over the bridge, and that other improvements had been made beyond the ex-

tension. It denied the legal proposition of the bill and the statement, that it furnished no police to protect the bridge. It asserted its right to tax and contended, that the order of the Circuit Court was valid. It alleged, that the bridge was completed in 1885, and the plaintiff refused to give it in for taxation, knowing that it extended from the old corporation to the middle of the Ohio, making at least half of the bridge liable. It asserted, that the old town had but six vacant lots, and extension was necessary, and many lots had been laid out and improvements made beyond the old limits within the extension.

The cause was heard on the bill, amended bill, exhibits, answer and replication; and the injunction was by decree perpetuated enjoining the town from hereafter assessing taxes on the bridge and vacating the order of the Circuit Court approving the extension of the corporate limits; and the town appealed.

This Court holds in this case, as in the case of *Davis v. Point Pleasant*, that the order of the Circuit Court is valid. As to this point reference is made to the opinion in that case *supra* p. Can the town of Point Pleasant extend its limits over the Ohio? We think it can. The territorial jurisdiction of the State extends to low-water mark on the northwestern side of the Ohio, under the act of cession by Virginia to the United States of the north-west territory. *Handly's Lessee v. Anthony*, 5 Wheat. 374; *Garner's Case*, 3 Gratt. 655; *State v. Plants*, 25 W. Va. 119; *Ravenswood v. Flemings*, 22 W. Va. 52. The Legislature representing the sovereignty of the State over its territory, has by the statute Code, c. 47, s. 48, delegated to municipal corporations the power of extending their limits without any restriction as to the location or character of the territory, over which the extension may run, and inferentially and logically they may extend such limits over any territory of the State, so that it go no further, whether such territory be land not covered with water, or rivers navigable or innavigable. Of course as to navigable rivers the powers of the town must be subject to the *jus publicum* of navigation. There is great reason, why such extension should cover such a river as the Ohio. The exertion of ordinary police functions to sup-

press disorder, places of dissipation and bad repute, and illicit selling of liquors, and for many other purposes, render corporate powers there as necessary as on the land.

The old charter of Point Pleasant could not, as contended by the town, have extended over the Ohio, as the act of 1794 organizing it enacted, that the 200 acres owned by Thomas Lewis at the mouth of Kanawha river, as laid off into lots and streets, should be established as a town. This tract did not cross the river, as the boundaries of riparian owners on the Ohio are limited to ordinary low-water mark. *Barre v. Fleming*, 29 W. Va. 314 (1 S. E. Rep. 731). The state owns the bed of the river from ordinary high-water mark.

Can the town tax this bridge crossing the river Ohio? We think it can,—so much of it as is within this State. It is property within the corporate limits of the town and the jurisdiction of the State. The State constitution as to state taxation declares that “all property, both real and personal, shall be taxed in proportion to its value.” This means, that all property must be taxed. *Railroad Co. v. Miller*, 19 W. Va. 408. Section 9, art. X. of the constitution provides, that “the Legislature may by law authorize the corporate authorities of cities, towns and villages for corporate purposes to assess and collect taxes.” Under this section the Legislature has by the Code c. 47, s. 31 directed, that the tax-levy “shall be upon all dogs in the said city, town or village and upon all the real and personal estate therein subject to state and county taxes.” Property subject to state taxation being thus made expressly subject to town taxation, it follows, that this bridge is not only liable to taxation for town purposes, but that it must be taxed, the council having no discretion to exempt it, every tax-paying owner of other property having the right to demand its taxation. That a bridge, though it be across the Ohio, is liable to state taxation, cannot be doubted. *Thomson v. Railroad Co.*, 9 Wall. 590; *Railroad Co. v. Peniston*, 18 Wall. 29; *Lane Co. v. Oregon*, 7 Wall. 77. It is conceded even in *Bridge Co. v. Louisville*, 81 Ky. 189, which denies the right to a city to tax such a bridge.

The United States supreme court, in opinion in *Lane Co. v. Oregon*, says of this power: “The extent, to which it

shall be exercised, and the subjects, upon which it shall be exercised, are equally within the discretion of the legislatures, to which the states commit the exercise of the power." Towns are in a material sense a part of the general machinery of the state government, auxiliaries of that government performing within limited districts various important functions helpful to the general order and welfare of the state; and the power of taxation is essential to their existence and efficiency. This taxing power vested in them, so far as the state has delegated it to them, is but a part of the state's taxing power, partakes of the nature of the source, from which it emanates, springs from its sovereignty as to taxation, and is justified by the same necessity in legal contemplation. The State having unlimited power to tax, it can retain a part and delegate to a municipality a part of its power; and it has done so.

The appellee cites with confidence the case of *Bridge Co. v. Louisville, supra*. One of the points of the syllabus in that case as to a bridge over the Ohio is: "Appellant's bridge is not subject to taxation by the city of Louisville. A city has no power to tax property, which derives no benefit from its government." This holding is based on several decisions in Kentucky, holding that farming lands within towns, but not laid off into lots, and through which there were no streets, and not near enough to the occupied parts of the town and streets to be benefitted by municipal government, can not be taxed by the town, and that as no streets or lots can be laid out in the river, and the company can not use its bridge save as its own property, it does not derive benefit from its use as city property. These cases are based on the idea, that the property derives no benefit from the town. This idea is fallacious. The bridge is or may be in many ways benefitted by town-authority. Its police protects the bridge from wanton injury; it improves streets leading to stations, where passengers and freight are received to pass, or which have passed over it, and in other ways that may be not always apparent. Some benefit it does and may at any time receive. It may not be benefitted as much as some others, but it is impossible to adjust benefits of municipal or any other government equally among all. But, be this as it may, the right to tax

does not depend on the presence or absence of benefit to the property taxed from the town-government. It arises from the fact, that the bridge is property owned by a private corporation, situate within the town and for that reason liable like a natural person's property to taxation. This Court in *Powell v. Parkersburg*, 28 W. Va. 698, and *Davis v. Point Pleasant*, ante, disregarding the question of benefits, that may or may not flow to the property from inclusion within the town, holds that all property real and personal within a town is liable to town-taxation. The able and lamented counsel for the appellee was able to cite us no other case than the Kentucky case to support him on this point, and I have not myself met with any other. It may be added that the statute regulating assessment of taxes, in Code c. 29, s. 63, requires railroad bridges to be assessed. The fact that the State owns the bed of the river on which the bridge rests, and the other fact that there exists a public right of navigation, can not exempt the bridge. The company obtained from the State and the United States license to build, own and operate the bridge,—obtained the right of way,—but the bridge is not a part of the State's property, but is the property of the company separate from the soil for taxation purposes and not exempt, because the bed of the river is exempt. It is the company's property, in its use and occupation, under a mere right of way granted by the State.

As to the charge of fraudulent intent in the extension of the town-limits, it is denied in the answer, and there is no proof of it. But we cannot as a court impute fraudulent motive to the action of a town-council and the people in performing functions authorized by law. 1 Dill. Mun. Corp. § 311; *Cooley*, Const. Lim. 187, and note 1. The bill alleges, that taxes for 1886 were assessed, whereas the order extending did not take effect until September, 1886; but the bill is blank as to the amount of taxes for 1886,—in effect, no allegation as to that matter.

The decree of the Circuit Court must be reversed, the injunction dissolved and the bill dismissed with costs to defendant in both courts.

REVERSED.

CHARLESTON.

SEWING-MACHINE Co. v. DUNBAR.

*(GREEN, JUDGE, absent.)

Submitted January 22, 1889.—Decided March 4, 1889.

1. BILL OF REVIEW—NEWLY-DISCOVERED EVIDENCE.

The filing of a bill of review for newly-discovered evidence is not a matter of right but rests in the sound discretion of the court.

2. BILL OF REVIEW—NEWLY-DISCOVERED EVIDENCE.

A bill of review for newly-discovered evidence will not lie, where the evidence is simply confirmatory or cumulative. It must be decisive in its character, such as ought, if true, upon rehearing to produce a different decree, and of which the party was ignorant at the time of the decree and could not have learned by the exercise of reasonable diligence.

3. BILL OF REVIEW—NEWLY-DISCOVERED EVIDENCE.

If a party allege the finding of a document since the decree, which would have been relevant evidence for him on the hearing, and knew of its existence and contents, though he made diligent search for it before the decree without finding it, yet if he could have proven its existence and contents by the evidence of witnesses, he should have done so, and can not on that ground sustain a bill of review.

4. BILL OF REVIEW—NEWLY-DISCOVERED EVIDENCE.

Where the court of appeals decides the principles of a cause and sends the cause to the Circuit Court with a mandate to enter a decree of a specific character and for further proceedings merely to execute it, though there can not be a bill of review for error of law, yet there may be for after-discovered matter. But to allow a bill of review in such case great caution should be observed, and the new matter should be very material and newly-discovered and unknown to the party at the date of the decree, such as could not have been discovered by the use of reasonable diligence, and not simply confirmatory or cumulative in its nature, but decisive in effect; such as ought, if true, to call for a different decree.

Loomis & Tavenner for appellant.

L. Smith for appellee.

*On account of illness.

32	335
45	443
45	445

32	335
52	658

32	335
54	83
54	88

32	335
59	235

32	335
62	221

BRANNON, JUDGE :

A report of a decision in this cause is to be found in 29 W. Va. 617 (2 S. E. Rep. 91.), where will be found a statement of the facts, as the case then stood. When the case went back to the Circuit Court of Wood, that court under a mandate from this court entered a decree giving the plaintiff its debt, annulling the deed dated 11th July, 1881, recorded 2d June, 1884, and subjecting the two tracts of land mentioned in that deed to sale. Then, it seems, James T. Dunbar applied to the Circuit Court for leave to file a petition in the nature of a bill of review, and leave was refused. This is not incorporated in the record; but is not material here. Later he presented what styles itself an "amended petition," and asked leave to file it as in the nature of a bill of review; but on the 18th of February, 1888, leave was refused, and he appeals here.

This petition avers, that since the mandate of this Court and the entry of the decree of sale of the 6th March, 1886, he had discovered new and material evidence, of which he was ignorant at the time of the entry of said decree; that before the entry of said decree he had without success diligently searched for an original deed executed by and between John V. Dunbar, Thomas J. Bunbar and petitioner dated July 11, 1881, not recorded, executed pursuant to and was evidence of the agreement, in consideration of the performance of which John Dunbar executed the deed, which had been set aside; that in March, 1887, while removing his household goods he discovered the deed acknowledged, as appears by Justice Bickel's certificate thereto, by Thomas J. Dunbar, 10th October, 1882, and by John V. Dunbar and petitioner, 6th April, 1883. He files this deed, which conveys the two tracts making together ninety four acres to Thomas J. and James T. Dunbar in consideration of their agreement to keep him and pay his debts.

He files an affidavit of Bickel stating, that Thomas J. Dunbar acknowledged the deed as stated in the certificate, and that on April 6, 1883, John V., James T. and Thomas J. Dunbar were together on the land described in the deed, and he was requested to take and certify their acknowledgement

of the deed ; that John V. Dunbar said the land was James T's, and the matter had been neglected and ought to have been fixed a good while before ; that a deed was produced and acknowledged by the Dunbars, and he certified it, and it was discovered, that the wrong deed had been acknowledged, and that the deed acknowledged was a deed from John V. to James T. and Thomas J. Dunbar for another tract, and bore date May 19, 1876, which deed is also filed, (it is similar in consideration and phraseology except as to the description of land with the other deed ;) that thereupon the deed dated July 11, 1881, was produced and acknowledged, and certified as to acknowledgement by John V. and James T. Dunbar, and the deed was left on a table in the house on the land, where James T. and John V. Dunbar lived. Bickel further states, that he knew James T. Dunbar had possession of the land before 6th April, 1883, and he had time and again seen him working on it clearing and exercising acts of ownership over it and treating it as his own, and he had cleared twenty acres, and remodelled the house. He further states, that since 11th April, 1883, he had lived about five miles from James T. Dunbar in a different neighborhood and did not know of this suit until 1887, when he heard of the decree for its sale, and he did not mention the subject to James T. Dunbar and did not talk with him on the subject until July, 1887.

The petitioner further states, that he had found in a box said original deed for the tract of 100 acres, dated 19th April, 1876 ; that both were in the writing of Thomas J. Dunbar ; that neither of said deeds was ever delivered to him or Thomas J. Dunbar, but both were written pursuant to an agreement to that effect and at the instance of John V. Dunbar. He files an affidavit of James L. Bailey, that in July or August, 1882, John V. Dunbar brought to Bailey, a justice, a deed, which had been already signed by John V. Dunbar and, as he remembers, by James T. Dunbar and either Thomas J. or George H. Dunbar ; that John V. acknowledged it, and left it to be acknowledged by the other parties, and he kept it some weeks, and returned it to John V. without any certificate, as the others had not acknowledged it. Bailey states, that he believes it to be the same deed referred to in Bickel's affidavit. He also states, that

on said occasion John V. Dunbar told him, that the land belonged to the boys. Petitioner files an affidavit, and gives it effect in his petition, made by Churchill Baxter, that he was near by and heard a conversation on Market street, Parkersburg, near Atkinson's store, between Handley, agent of plaintiff, and James T. Dunbar, wherein he heard James T. Dunbar tell Handley, when speaking of the sewing-machine business, that he and his brother owned the land, and if Tom wanted to go into the business he would buy his interest in the land. He also alleged the contents of and filed an affidavit of Preston Groves, that Groves heard a conversation near the well on the farm between James T. Dunbar and Handley about the sewing-machine business, and heard James T. Dunbar tell Handley, that the land belonged to him and his brother, and if his brother wanted to go into the business, he would buy his interest in the land and thus help him into it.

Petitioner further states, that, after his original petition had been presented to the Circuit Court for review and refused, George A. Loomis called his attention to facts set out in Loomis's affidavit filed with petition. It is to the effect, that on April 19, 1876, John V. Dunbar came to him as attorney to get him to prepare some papers stating, that he and his wife were getting old and feeble, and that he had talked to his three sons, James, George and Thomas, and thought that he could make arrangements with them to pay his debts and support him and their mother; in consideration of which he proposed to convey to them his farm, and requested Loomis to draw a deed looking to that arrangement, which he could use as a form to copy from, if the boys were willing to go into it; and that he wrote the deed before referred to of 19th April, 1876; and doubting whether the lien therein retained would compel the boys to comply with what was incumbent on them, he drew a separate contract to be signed by them; that afterwards he said this arrangement as to the Valley Mill farm, to which the form relates, had fallen through, and he returned the form so drawn; and Loomis thinks Dunbar told him he had made similar arrangements as to the Walker's Creek farm, but did not remember the details of what Dunbar told him

as to this, (as to this, Loomis' affidavit is indefinite;) that these papers had been filed away, and had only recently come to light; he had forgotten them; and that he did not tell James T. Dunbar of them until after the decision of the case by this Court, and he could not have learned it by any diligence.

The single question for the decision of this Court is: Did the Circuit Court properly deny James T. Dunbar leave to file his petition as a bill in the nature of a bill of review? We think the Circuit Court was correct in so ruling. The application was based on newly-discovered matter, not on error of law apparent.

1. As to the discovery of the deed of May 11, 1881. What is its office in this cause? Not to confer title; for appellant says it was not delivered and could not take effect as a deed. Right under it was not claimed in the pleadings, on which the decree rested. A similar deed dated 11th July, 1881, for the same land between the same parties was in the record, when this case was formerly before this Court. James T. Dunbar as witness denied its existence, declaring the agreement verbal. On cross-examination he was made to admit it and to file it, and he declared it had been drawn up at the time of the alleged contract between John V. Dunbar and James T. and Thomas J. Dunbar, but never acknowledged or delivered. He said it was at home in his bureau drawer. He denied any other memorandum than that unacknowledged deed; but now he produces one regularly acknowledged. This deed is identical in language with the other; a *fac-simile*. He then in defence, relied on the deed to him alone, that is, the one recorded 2d June, 1884, annulled by the decree. He did not want to rely in any way on the deed unacknowledged, commented upon by JOHNSON, P., because that gave half the tract to the debtor, Thomas J., and would make half of it liable. He risked his cause on the deed to himself alone.

Now, after this Court has overthrown that deed as and because infected with fraud, when *in extremis*, as a *dernier* resort, he evokes from its hiding place this deed just like the other two in date, consideration and language, except that in one James T. is sole grantee, in the other two he and Thomas J.

Dunbar. For what purpose does he call it forth? To prove that this deed acknowledged as early as 10th October, 1882, and 6th April, 1883, reciting a contract between John V. Dunbar and his sons, whereby he was to convey the land to them in consideration that they pay his debts and keep him and his wife, is evidence of such a contract,—an honest contract,—and that a deed was prepared to execute it long before the indebtedness, and thus remove the taint of fraud in the deed the court passed on. It is used not to set up title, but as evidence to repel the charge of fraud. The main question in the cause was, whether the deed attacked was fraudulent. The evidence bore on that chief point. This newly-found deed is only more evidence on that same point. The discovery of this deed is, if new matter, merely evidentiary matter, simply evidence on a fact in issue. It is *factum probans*, not *factum probandum*; for the fraudulent or honest quality of the other deed was the *factum probandum*. We must call it, therefore, newly-discovered evidence bearing on the main point.

There has been a question, whether new evidence to a fact already in issue can be received to support a bill of review; but it seems, if it be not simply confirmatory or cumulative evidence in the case, but decisive, such as would on rehearing produce a different decree, it will justify a bill of review. It must be such as would produce a different decree. *Nichols v. Nichols*, 8 W. Va. 174, syll., pt. 3; *Douglass v. Stephenson*, 75 Va. 756. In view of the whole case and of the opinion of this court heretofore expressed in it, I do not think this evidence is of that character or force. Before overturning a decree of any court on a bill of review on newly-discovered evidence, we should be clear, that, if true, it would command a different decree, because after a fair hearing it is to the interest of all, that the litigation should cease, especially as the filing of a bill of review is not a matter of right but lies in the sound discretion of the court. It may therefore be refused, although the facts, if admitted, would change the decree, when the court looking to all the circumstances shall deem it productive of mischief to innocent parties or from any cause advisable. *Nichols v. Nichols* 8 W. Va. 186. At any rate, it should be a clear case.

But what calls for greater caution before allowing the bill of review in this instance is the fact that this cause has been determined by this Court, and the decree was entered under its mandate. While the decree of the highest appellate court is not exempt from a bill of review for newly-discovered evidence, yet it has been held, that to sustain it in such case "the greatest caution should be observed, and the new matter, to be sufficient ground for the reversal of the decree, ought to be very material and newly-discovered, unknown to the party seeking relief at the time the decree was rendered, and such as could not have been discovered by the use of due diligence." *Henry v. Davis*, 13 W. Va. 256; *Campbell v. Campbell*, 22 Gratt. 649.

2. Another difficulty in the way of appellant is the fact, that this deed was signed by him and Thomas J. Dunbar, and he was present when his father executed it, and they all three acknowledged it, as appears by the certificate of Justice Bickel, and were all present when it was acknowledged by John V. and James T. Dunbar. Now, to get a re-hearing, he says the deed is new and material evidence, of the existence of which and its whereabouts at the date of decree, he could not have known by due diligence. Why not? He says he searched for it. Then he knew while taking evidence of its existence and contents, if he did not know of its whereabouts; and he could and should have proven its existence and contents by his own evidence, his brother's and Justice Bickel's. His evidence, that he searched and could not find it, must be taken with caution; for the opinion in this case in 29 W. Va. 617 (2 S. E. Rep. 91) holds his evidence untrustworthy, applying to it the maxim, *falsus in uno, falsus in omnibus*. If we tolerate such negligence in not proving the contents of a lost document, when three witnesses were attainable and known to the party, or permit him to say, that he could not find so important a paper in his possession or at his house, and come in after protracted litigation and undo a solemn decree, when will litigation stop? The suspicion arises, that as this acknowledged deed gave half the land to his brother, the debtor, its presence was not desirable, except as a weapon of defence in the extremest necessity. He says it was among his

household goods. Strange that it could not be found. This deed is the only point presented by appellant that requires much consideration.

As to the evidence of Baxter, Handley was asked by appellant on cross-examination, whether in a conversation on Market street, Parkersburg, near Atkinson's store, he was not told by him, that the land was the property of himself and his brother, and Handley denied it. Baxter said, he heard appellant so tell Handley. As to the evidence of Groves, Handley was asked, whether in a conversation on the farm near the well about the sewing-machine business, appellant did not tell him that the land belonged to him and his brother, and that if his brother wanted to go into the sewing-machine business, he would buy his interest in the land and thus help him into it, and he denied it and said, that on the contrary the appellant represented his father as owner. Groves says, he heard this conversation, heard appellant tell Handley what is indicated in the question, and appellant as a witness states, that he so told him. Now, as to both Churchill's and Groves's evidence, we may say, that it is merely more evidence to show that appellant informed Handley that the land was not John V. Dunbar's, but his and his brother's; cumulative or corroborative merely, and not such as necessarily to produce a different decree.

The evidence of Bickel and Bailey, in so far as it gives declarations of John V. Dunbar, that his sons owned the land, and shows James T. Dunbar's possession and improvement of the land, is plainly only cumulative, and must have been known to appellant before decree, or could have been known by reasonable diligence.

The evidence of Loomis and the papers produced by him showing the desire of John V. Dunbar in 1876 to convey another tract to his sons to get them to keep him is either irrelevant or, if relevant, as tending to show such desire, and thereby rendering it probable, that some years afterwards he did make an arrangement with two of his sons to pay his debts and keep him in consideration of his conveying the ninety four acres involved in this suit, is only cumulative or additional evidence on matter involved in the decree, and not of a decisive nature to call for a different decree.

The decree of the circuit court of February 18, 1888, refusing leave to file said petition, is affirmed with costs to appellee in both courts.

AFFIRMED.

CHARLESTON.

JONES v. GILLESPIE.

Submitted January 22, 1889.—Decided March 4, 1889.

*(GREEN, JUDGE, absent.)

1. REVERSAL OF JUDGMENT.

A case in which a decree of the Circuit Court is reversed upon the facts.

2. REVERSAL OF JUDGMENT.

Where a subsequent decree is based solely upon a previous decree in the same cause, the reversal of the latter will necessarily result in the reversal of the former.

H. M. Russell and *W. P. Hubbard*, for appellants.

D. D. Johnson, for appellee *D. H. Jones*.

SNYDER, PRESIDENT :

This is an appeal from two decrees pronounced by the Circuit Court of Wood county in the consolidated suits of *Jones & Haines v. R. H. Gillespie, trustee and others*, and *A. P. Riggs & Co. v. John A. Armstrong and others*, on July 25, 1885, and March 12, 1887, respectively. Jones & Haines having become deeply indebted in the year 1881 conveyed all their property real and personal to R. H. Gillespie, trustee, for the benefit of their creditors; and in these consolidated suits the liens on the lands thus conveyed to Gillespie were ascertained and fixed. Among these lands was a tract of eighty seven acres in Pleasants county known as "Tract No. 7." According to the priorities of the liens it was

*On account of illness.

found, that the defendants, The Monitor Tow-Boat & Lumber Company and John A. Armstrong, had the first liens on the said tract No. 7 for an amount largely in excess of its value, so that the said defendants were entitled to the whole of the proceeds of said tract. By a decree entered August 7, 1883, the sale of all said lands was directed; but upon the petition of D. H. Jones the sale of said tract No. 7 was by the same decree suspended, until the matters arising upon said petition might be determined. In this petition D. H. Jones set up a claim to tract No. 7 and asserted, that he was the owner of the said land and entitled to a conveyance thereof. Jones & Haines answered this petition denying its averments, and evidence was taken by both parties in respect thereto, but it was not until the aforesaid decree of July 25, 1885, that the court took any action upon said petition. By that decree the court determined, that D. H. Jones was entitled to said land and directed, that it should be conveyed to him. In the meanwhile however, on November 30, 1883, a decree was entered containing the following clause:

"On motion of the defendants Armstrong and the Monitor Tow-Boat and Lumber Co., and by consent of the petitioner, D. H. Jones, it is ordered that unless said Jones do, within sixty days from this date, give bond, * * * the said petition shall be dismissed; so much of the decree of Aug. 7, 1883, as suspends the sale of said tract of eighty seven acres shall have no further effect; and the special commissioners heretofore appointed shall proceed to sell said tract as directed by other provisions of said decree of August 7, 1883."

The said commissioners after having waited more than sixty days proceeded on March 11, 1884, to sell said tract No. 7, and John A. Armstrong became the purchaser at the price of \$500.00; and on August 12, 1884, the court entered a decree confirming said sale and directed the proceeds to be paid on the debts previously ascertained. But before said sale, to wit, on March 8, 1884, without the knowledge of the commissioners or notice to the parties interested, the court entered an order extending the time, within which the said D. H. Jones might give the bond required by the decree of

November 30, 1883, forty five days from that date. The bond was subsequently given on March 29, 1884, which was eighteen days after the sale of the land. After the said sale to John A. Armstrong had been confirmed, he executed a deed showing, that he had purchased said tract No. 7 for the Monitor Tow-Boat & Lumber Company, which company on July 17, 1885, before said decree of July 25, 1885, had been made, executed a general assignment of all its property including the said tract of land No. 7 to Thomas O'Brien for the benefit of its creditors.

On July 27, 1885, D. H. Jones exhibited in the said court his bill in the nature of a bill of review, in which he sets forth the decrees and orders hereinbefore mentioned and avers, that John A. Armstrong is in possession of said tract of eighty seven acres of land, and prays, that the sale of said land may be set aside, and the said decree of August 12, 1884, confirming said sale be reviewed and reversed, and the purchase-money paid by said Armstrong refunded to him *etc.*

The defendants John A. Armstrong, The Monitor Tow-Boat & Lumber Company and Thomas O'Brien answered this bill claiming, that the respondent, O'Brien, was a purchaser of said land without notice or knowledge of the claim of D. H. Jones thereto, and that R. H. Gillespie, trustee, under whom respondents claim, was also a *bona fide* purchaser without notice; and that therefore they are unaffected by any equity of said D. H. Jones, if he has any, in said land; and they also deny the sufficiency of said bill of review and pray, that the same may be dismissed.

On March 12, 1887, the court entered the second decree, from which this appeal is taken, by which the court reversed and set aside the said decree of August 12, 1884, confirming said sale, set aside the sale, and directed the said O'Brien, assignee as aforesaid, to refund to John A. Armstrong the money paid by him on the purchase of said land and surrender to him his unpaid notes given therefor. The appellants here are John A. Armstrong, The Monitor Tow-Boat & Lumber Company and Thomas O'Brien, assignee of said company; and the material errors they assign, are as follows: *First*, in respect to the said decree of July 25, 1885,

they claim, that the trust set up in the petition of D. H. Jones was not such, as could have been enforced, even if established, and that it was not established by the evidence; and *second*, if enforceable against Jones & Haines, it could not be enforced against R. H. Gillespie, trustee, because he was a purchaser for value without notice; and *third*, that the said decree of March 12, 1887, improperly sustained said bill of review, for the reason that said bill made no sufficient or proper case for granting the relief prayed.

1. D. H. Jones in his said petition states, that in August, 1876, he purchased from T. W. Ewart the said eighty seven acres of land at the price of \$400.00, of which \$100.00 was to be paid cash and the residue in annual payments of \$100.00 each with interest; and that Ewart executed and delivered to him a title-bond to make him a deed on the payment of the purchase-money; that he made the cash-payment and executed his three several notes for the deferred payments; that, when the first note became due, he made an arrangement with Jones & Haines to pay the same to Ewart for him, and he would repay them by delivering to them staves, timber *etc.*; and that in order to make said Jones & Haines perfectly safe in paying for said land he assigned and delivered said title-bond to them as collateral security; that said Jones & Haines after permitting suit to be brought on said first note paid the same and the costs thereon and charged the amount to him on their books; that subsequently, on July 20, 1877, he and they had a settlement of their accounts, and after satisfying the amount paid by them on said note he owed them a balance of \$4.63; that afterwards he continued to deliver lumber and other materials to Jones & Haines, and up to March 15, 1881, he had furnished them more than enough to pay for said land and all the accounts, they had against him; and that notwithstanding this fact the said Jones & Haines on March 15, 1881, when they paid off the last note for said land, produced to said Ewart said title-bond with the assignment thereon and without authority and in fraud of petitioner's rights obtained from said Ewart a deed of that date for said land; that said R. H. Gillespie, trustee, to whom Jones & Haines conveyed said land by deed dated April 27, 1881, as well as John A. Armstrong, The Monitor Tow-Boat & Lum-

ber Company and the other creditors secured in said trust-deed were fully advised of the facts and had notice, that said land was owned by petitioner. He prays, that said deed to Jones & Haines for said land may be declared void, and the land conveyed to him *etc.*

Jones & Haines in their answer to said petition aver, that after D. H. Jones had contracted to purchase said land, Ewart refused to give him possession of it, until he paid or secured the cash-payment, and he being unable to pay it, at his request they indorsed his note for the amount; that Jones allowed this note to be protested and sued upon, and respondents were compelled to pay it; that then, in order to give Jones further time on the other notes, they indorsed them for him upon his promise to assign to them the said title-bond; that as these notes severally fell due the said Jones was unable to pay any part of them, and they were paid by respondents, but before they made the last payment Jones told them, they might take the land, and thereupon he assigned and delivered to them the title-bond, and they paid the balance due on the land, and the deed was made to them by Ewart; that Jones has never repaid them one cent of the purchase-money paid by them for the land, and that no part of said purchase-money was ever charged to him on their books; that upon a settlement of the book-accounts between them and Jones, outside of the money they paid for said land, he will be indebted to them about \$200.00; and that a suit has been brought against said Jones to recover this balance. They deny, that said Jones ever paid one cent on said land, or that he has any claim, title or interest therein whatever. They deny, that there was any fraud on their part in said transactions, and aver, that they were *bona fide* purchasers and the rightful owners of said land, at the time they conveyed the same to R. H. Gillespie, trustee.

It would subserve no useful purpose to detail or even review the volume of depositions filed in respect to the issues raised upon said petition and answer; therefore I shall content myself by stating, that I have most carefully and patiently read and considered all of said depositions and the other evidence in the cause, and, after mature consideration of the whole record, it seems to me, the petitioner has wholly

failed to make out his claim, and that the decided weight and great preponderance of the proofs fully sustain the averments of the answer. I am therefore of opinion, that the said decree of July 25, 1885, is erroneous and must be reversed and set aside; and instead thereof a decree must be entered by this Court dismissing said petition with costs to Thomas O'Brien, assignee *etc.* This conclusion makes it unnecessary to consider the other errors assigned, because it follows as an inevitable consequence, that the decree of March 12, 1887, which is based solely upon said decree of July 25, 1885, is also erroneous and must be reversed and set aside, and the other decree of August 12, 1884, and the sale confirmed thereby left and continued in full force. The said decrees are therefore reversed.

REVERSED.

CHARLESTON.

STATE v. RICHARDS.

*(GREEN, JUDGE, absent.)

Submitted January 22, 1889.—Decided March 7, 1889.

LICENSES.—CONSTITUTIONAL LAW.

That clause of section 2, c. 32, Code, as amended by chapter 17, Acts 1885, which reads: "Nor shall any agent travelling with one or more horses sell any lightning-rod, sewing-machine, or organ or other musical instrument without a state license therefor," is not unconstitutional, as applied to such agents selling Singer sewing-machines manufactured out of this state.

Cole & Miller for plaintiff in error.

Attorney-General Alfred Caldwell for the State.

BRANNON, JUDGE:

J. A. Richards was indicted in the Circuit Court of Wood county on the charge, that as agent and salesman of The

*On account of illness.

Singer Manufacturing Company, a corporation under the laws of the state of New Jersey, without a license he unlawfully as such agent travelling with one or more horses did sell, offer and expose for sale sewing-machines known as "Singer Sewing-Machines." Defendant moved the court to quash the indictment; but his motion was overruled. He pleaded not guilty, and a jury convicted him; and after overruling a motion for a new trial and in arrest of judgment the court gave judgment against him for \$10.00 fine. He also tendered a special plea to the effect, that at the time of committing the offence he was engaged in selling as agent, and not otherwise for The Singer Manufacturing Company, a corporation under the laws of New Jersey, and for no one else, Singer sewing-machines, which were manufactured by said company in New Jersey; and averring that section 2 of the act of the legislature of 1885, under which the indictment was found, was repugnant to the constitution of the United States; which plea was rejected and exception thereto taken.

It was proven, that in 1886 defendant was employed by The Singer Manufacturing Company to sell sewing-machines called "Singer Sewing-Machines;" that he on June 30, 1886, sold one machine in Wood county and others during the year prior to the indictment; and that in selling he travelled with one horse and wagon; and that he sold only Singer machines; and that they were all manufactured in New Jersey and none in West Virginia; and that defendant travelled through the country and sold machines; that it was his duty to sell and deliver machines received by him from the company's office in Parkersburg, W. Va. It was agreed, that said company was a corporation under the laws of New Jersey. The defendant obtained this writ of error.

The defence is based on the contention, that the statute, on which the indictment stands, is in violation of that clause of the constitution of the United States giving Congress power to regulate commerce among the states. The statute involved here is found in chapter 17, Acts 1885. Section 2 provides: "No person without a state license therefor shall act as hawker or peddler * * * Nor shall any agent travelling with one or more horses sell any lightning-rods, sewing-

machines, or organ or other musical instruments without a state license therefor." The statute contains a penalty section. It is contended, that the closing clause of section 4 renders the above provision as to agents unconstitutional. Section 4, after specifying several exemptions from the license taxation imposed by the preceding sections, closes with the clause: "Nor shall any company or person engaged in manufacturing goods in this state be required to pay a license as peddler for selling such goods either by himself or his agent."

Let us first understand the effect of the statute in hand. If it could be said that under it an agent travelling with a horse selling sewing-machines manufactured out of the state must have license, while one so travelling selling machines manufactured in the state is exempt from license, I should think the act would be unconstitutional, as held by the supreme court of the United States in *Webber v. Virginia*, 103 U. S. 350, and *Welton v. Missouri*, 91 U. S. 275. See also, *Hinson v. Lot*, 8 Wall. 148; *Ward v. Maryland*, 12 Wall. 418; *Mobile v. Kimball*, 102 U. S. 697. But I can not hold that such is the construction of the statute. I think an agent so travelling selling sewing-machines manufactured in the state is subject to license as well as one selling machines manufactured out of the state. The said clause of section 2 expressly subjects them to license.

Section 4 has for its purpose the taking out of sections 1 and 2 certain subjects, and exempting them from license-taxes; and, to exempt any subject from taxation so plainly imposed, we must be sure the subject falls within the exemptions. Exemption from taxation should be closely construed. Remember that the closing clause of section 4 says: "Nor shall any company or person engaged in manufacturing goods in this state be required to pay a license as peddler." But for this a home manufacturer of goods traveling and selling his goods himself like a peddler would have to get a peddler's license, as he would be doing that which would make him a peddler. So, but for it, if his agent travelled and sold, he would by even the defendant's construction, unless he were selling lightning-rods, sewing-machines, or musical instruments, be liable to peddler's license.

But this clause takes him out of the category of peddlers. The statute clearly makes peddlers a class for license, and agents travelling with one or more horses selling certain articles a separate and distinct class for license. This clause does not say he shall not pay a license as an agent so travelling, selling lightning-rods *etc.*, but that he shall not be required to pay a license "as peddler." Why make the statute say he shall not pay a tax as agent travelling with one or more horses selling lightning-rods, sewing-machines, *etc.*, when it does not say so in terms, and when we know, that this same act has just made two separate classes of peddlers and such agents for license taxation, and when to bring a subject under exemption from taxation clearly imposed by a preceding section we should have clear language? If the legislature had intended to exempt them from tax as agents, why did it not use the words "as agents," not the words "as peddler,"—make it exempt one tax of one amount, when it in terms exempts a different tax of a different amount? For chapter 20 of Acts of 1885 makes different amounts of license taxes on such peddlers and agents.

Another argument: The statute says: "Nor shall any company or person engaged in manufacturing goods in this state be required to pay a license as peddler for selling such goods;" and adding the words, "either by himself or his agent,"—adding those words, not for the purpose of defining who should be exempt, for it had already declared that any company or person manufacturing goods in this state should be exempt, but only to declare him exempt whether selling by himself or by agent. The office of the clause is not to exempt agents selling goods manufactured in this state, but to exempt the company or person manufacturing goods in this state from the tax of a peddler and as a peddler, whether he sell by himself or his agent. If it be said, that the Legislature could hardly have regarded it necessary to put in this clause to exempt from peddler license, as it would not be thought that he would have to pay both peddler's and agent's license,—double tax for one right,—I reply, that the object was to exempt the home manufacturer when selling as a peddler, from peddler's license, which he would have to pay but for this clause; and as to an agent it was inserted

out of abundant caution, to avoid any pretence of double taxes. I think this construction greatly strengthened by reference to another chapter of the Acts of 1885. The function of chapter seventeen, which we have been discussing, is to declare what callings shall be subject to license, while the function of chapter twenty is to declare the amounts of license taxes, and being *in pari materia*, they can be properly considered together.

In s. 4, c. 20, Acts 1885, fixing the rates of taxes on licenses, will be found the following language: "On Hawkers or Peddlers. On every license to act as hawker or peddler, if the person licensed travel on foot without a horse, fifteen dollars; if he travel with one or more horses, with or without a wagon or other vehicle, seventy five dollars: provided, this clause is not to be construed as embracing what are known as 'farm' or 'produce' hucksters. But no company or person who is a resident of this state, and engaged in manufacturing goods in the state, shall be required to pay a license as peddler for selling such goods, either by himself or agent." Now, here, when the Legislature comes to fix the tax on licenses, it names this same company or person engaged in manufacturing goods in this state exempted from license by the clause quoted above from section 4, c. 17; and he is exempted from what? Not from tax as agent traveling with horse or horses selling lightning-rods, sewing-machines, *etc.*, but from license as peddler, using the same language used in said closing clause of section 4, c. 17. The draughtsman remembered that he had been exempted from peddler's license by the chapter prescribing the callings subject to license, and to be consistent, exempts him from the same kind of tax when laying the tax. This shows, that the legislature which passed both these chapters, did not intend to exempt from license-tax as agents the agents of a company or person engaged in manufacturing goods in this state, when travelling with a horse, selling sewing machines, but only to declare them free from tax as peddlers, and tax them as a different class. And immediately following in the same section 4, c. 20, we find the following: "Salesmen of Sewing-Machines, Lightning-Rods, Organs, *etc.* On every license to sell sewing-machines,

if the salesman thereof travels with one or more horses, twenty dollars; on every license to sell organs or other musical instruments, if the salesman thereof travels with one or more horses, thirty dollars; and on every license to sell lightning-rods, if the salesman thereof travels with one or more horses, fifty dollars." Now, evidently, from this language, this is the same agent, whom we met and became acquainted with, and a short time since took leave of in the closing clause of section 4, c. 17; but no exemption is found in his favor, when he comes to be taxed, though he be the travelling sale agent of a company or person manufacturing goods in this state. Our said statute thus construed makes no discrimination as to license taxation between agents selling sewing-machines manufactured in this state and those made out of the state, both being alike liable. If there be no such discrimination between the products of different states, the state has unquestionable power to license tax, as held by the United States supreme court in *Woodruff v. Parham*, 8 Wall. 125; *Paul v. Virginia*, Id. 177; and many other cases cited in *Walling v. Michigan*, 116 U. S. 453 (6 Sup. Ct. Rep. 454.) And such being the construction of the state statute by the Supreme Court, avoiding such discrimination, such will be its construction as a finality by the Supreme Court of the United States, and the statute so construed will be by that court held constitutional. *Machine Co. v. Gage*, 100 U. S. 676; *Leffingwell v. Warren*, 2 Black 599.

It is an accepted rule, that a court will not declare a statute unconstitutional, unless it be clearly so, unless there be no escape from such decision; and it is also an accepted rule, that among contesting constructions that one should be given to a statute, which will render it valid and consistent with the constitution, rather than one that will overthrow it, unless it be plain that the other should be given.

The counsel for defendant cites and relies on the case of *Robbins v. Taxing Dist.*, 120 U. S. 489, (7 Sup. Ct. Rep. 592,) holding, that a statute of Tennessee, that "all drummers and all persons not having a regular licensed house of business in the taxing district of Shelby county, offering for sale or selling goods by sample," should be required to pay taxes for

the privilege, was void as contrary to the United States constitution as to persons soliciting the sale of goods on behalf of individuals or firms doing business in another State. It must be admitted that this case and the case of *Asher v. Texas*, 128 U. S. 129, (9 Sup. Ct. Rep. 1,) are in advance of former decisions of the same court in restricting taxation on callings by the State, if not in conflict with them, as seems to be admitted by Justice BRADLEY in the latter case. But they were cases of persons selling by sample or soliciting orders for persons residing or doing business in other States, taxing the mere act of soliciting, when the property had not arrived in the State. Here the party was in the State, perhaps a part of its population, travelling with the machines in his possession in the State, obtained from the store-house of the company at Parkersburg, in this State.

Justice BRADLEY's opinion contains some strong arguments as to the practical hindrance of interstate commerce by compelling a person soliciting orders for the sale of goods in one State from persons doing business in another, the goods at the time being out of the state to pay tax; thus taxing that immense business done by commercial travelling agents, by which in these days the greater part of the immense sales are made. His whole argument is plainly bearing on that. He distinctly says the States may impose taxes "on persons residing within the state or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the constitution and laws of the United States, and the imposition of taxes upon all property within the state mingled with and forming a part of the great mass of property therein. But in making such internal regulations a state cannot impose taxes upon persons passing through the state or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not yet become part of the common mass of property therein; and no discrimination can be made by any such regulations adversely to the persons or property of other states, and no

regulations can be made directly affecting interstate commerce." Elsewhere he inquires: "Whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states for selling or seeking to sell their goods in such state before they are introduced therein." He then discusses the inconvenience to business-men, if they were not allowed to send their agents into other states to solicit orders. He then refers to the suggestion that thus the taxing powers of the States may be crippled, and says: "This may be true to a certain extent, but only in those cases in which the States themselves, as well as individual citizens, are subject to the restraint of the higher law of the constitution; and this interference will be very limited in its operation. It will only prevent the levy of tax, or the requirements of a license, for making negotiations in the conduct of interstate commerce."

As applied to taxing persons travelling and soliciting orders, there seems to be force in the argument. I do not understand it to go further,—not to the extent of denying the state right to require a license tax of peddlers or travelling agents carrying their property with them in the state, and selling and delivering it, because of the accidental circumstances, that that property came for sale from another state. Justice BRADLEY, as, I think, appears from the above extracts from his opinion, has in mind and hand the case of drummers selling by sample for principals in other states, who solicit orders for the sale of property not yet in the state. As the Attorney-General argues, I think "*Robbins v. Taxing Dist.* merely deals with a tax on a drummer selling by sample, and not with a man carrying goods with him for delivery as he sells, as in our case." I do not understand that high and able tribunal, the Supreme Court of the United States, to have gone to the extent claimed by the defence in this case, or to have denied the power to impose license-taxes, where they do not directly affect interstate commerce, or the right to tax salesmen having their goods in the state and selling them, simply because in instances such goods are manufactured in or sold by owners residing in other states. No one will be more ready than I to accord to the constitution and laws of the United States their pre-eminence, where I

can see the conflict of State law with them ; but I do not realize it in this case, nor do I construe the case of *Robbins v. Taxing Dist.* as operating to invalidate the statute of the state in question.

I think there was no error in rejecting the special plea. It states no other facts than the indictment contains, and the same question of the constitutionality of the statute sought to be raised by it was raised by the motion to quash ; and the same remark applies to the overruling of the motion for a new trial, and the overruling of the motion in arrest of judgment. If the statute be valid, the facts appearing certainly sustain the indictment. Nor do I think the indictment bad because it does not negative that clause of the act which provides that "no person engaged in manufacturing goods in this State shall be required to pay a license as peddler," *etc.* It is not a part of the enacting clause, on which the indictment rests. The pleader need only negative exceptions in the enacting clause ; not what comes in by way of proviso, or what is in nature but a proviso, and not in the enacting clause. *Hill's Case*, 5 Gratt. 682. The fact, that the indictment charges, the defendant did "sell, offer and expose for sale," whereas "sell" is the only word used in the statute, and it is no offence to "offer or expose" sewing-machines for sale, is immaterial. Those words are merely surplusage. The old maxim is, *utile per utile non vitiat*ur,—surplusage does not vitiate. 1 Bish. Crim. Proc. § 478 ; Code 1887, c. 158, s. 10.

I am of opinion to affirm the judgment of the Circuit Court, and the Court so orders.

AFFIRMED.

CHARLESTON.

BANK v. LUMBER Co.

*(GREEN, JUDGE, absent.)

32	357
38	363
32	357
147	749
32	357
654	343

Submitted January 22, 1889.—Decided March 7, 1889.

DEED—CORPORATIONS.—ESCROW.

After the corporators had signed an agreement to become a corporation, and before the charter had been obtained, a deed conveying land to such corporation by name was signed and acknowledged by the grantor and delivered to a third party with directions to retain it, until the corporation obtained its charter and organized, and then to deliver it to the corporation; and after the charter had been received, and the corporation had organized under it, such third person delivered the deed to and it was accepted by the corporation. *Held*: The said deed operated as a valid conveyance of said land to the corporation from the date of the delivery of said deed to it.

C. Heydrick, J. J. Davis and L. D. Strader for appellant.

C. C. & W. L. Cole for appellee.

SNYDER, PRESIDENT:

On December 7, 1886, the Spring Garden Bank, a Pennsylvania corporation, sued out of the clerk's office of the Circuit Court of Tucker county an attachment against the estate of Marcus Hulings, a non-resident of this State, and caused the same to be levied upon a number of tracts of land lying in the counties of Tucker and Randolph in this State. At the January rules, 1887, the said Spring Garden Bank suing on behalf of itself and other attachment-creditors exhibited its bill in said Circuit Court against the said Marcus Hulings, The Hulings Lumber Company, F. W. Mitchell and others to set aside a deed dated January 2, 1885, made by said Marcus Hulings to the said The Hulings Lumber Company purporting to convey to it the lands attached as aforesaid, and to subject said lands to the payment of certain debts due to the plaintiff and others from said Marcus Hulings. The bill assails said deed upon two grounds: *first*, that

*On account of illness.

there was no such body or corporation as The Hulings Lumber Company mentioned in the deed as grantee, at the time the deed was made, and, *second* that the said deed was voluntary and made for the purpose of delaying and defrauding creditors. Answers were filed by the defendants, and depositions taken, upon which the cause was heard, and a decree entered September 7, 1887, holding the said deed to be void, and referring the cause to a commissioner to ascertain and report the liens on said lands, *etc.* Upon the incoming of the commissioner's report, the court, on May 14, 1888, made a decree fixing the amounts and priorities of the various liens on said lands and directed a sale thereof. From this decree and that of September 7, 1887, the defendant, The Hulings Lumber Company, obtained this appeal.

The facts disclosed by the record appear to be as follows: During the years 1882, 1883 and 1884 Marcus Hulings purchased certain timber-lands and took options to purchase other lands in the counties of Tucker and Randolph along or near the Cheat river and its tributaries. On some of said lands he paid a part of the purchase-money, the whole amount paid by him not exceeding \$10,000.00 and obtained deeds therefor giving his notes for the balance amounting in the aggregate to about \$50,000.00, which were secured by vendors' liens retained in the deeds. On other portions of the lands he paid nothing, and for others still he had no deeds. By a written agreement dated April 30, 1884, the said Marcus Hulings, his son, Willis J. Hulings, and John E. Butler entered into copartnership under the name of Hulings & Co. for the purpose of dealing in petroleum, manufacturing lumber and buying, selling, holding and dealing in lands and buildings and operating saw-mills *etc.*, and carrying on a general lumber-business. The said Marcus Hulings for the consideration stated in said agreement sold to his son and said Butler a two thirds interest in all of said lands and options, thus making the said Marcus Hulings, Willis J. Hulings and the said Butler, each the owner of one third of said lands, subject to the vendors' liens existing thereon; and on the same day the said Marcus Hulings by a contract in writing bound himself to convey all of said lands subject to the said vendors' liens to a trustee, to be appointed by the said

firm of Hulings & Co., as soon as surveys thereof could be completed and the titles passed upon by counsel. The said firm at once entered into the possession of said lands and began to operate them in the lumber-business and purchased other lands with partnership-funds taking the title in the name of said Marcus Hulings, who was to convey the whole of said lands to a trustee, when appointed as designated in said agreement. The said firm also took up a large number of the notes, which had been given by said Marcus Hulings for said lands.

Before the conveyance of said lands or the selection of a trustee, to whom they could be conveyed, the said firm of Hulings & Co. decided to become an incorporated body, and that said conveyance should be made to said corporation instead of to a trustee. Accordingly, on January 2, 1885, the parties duly executed an agreement to become a corporation of the state of West Virginia by the name of "The Hulings Lumber Co.," and on the same day but subsequent to the execution and filing of said agreement the said Hulings & Co. by a writing duly signed by said firm, agreed that they would "cause to be conveyed unto said corporation" all the aforesaid lands, to which Marcus Hulings held the title, and also the mills and other property; that had been acquired by said firm in the lumber-business subsequent to the date of the aforesaid agreement of April 30, 1884. In pursuance of this writing or contract of January 2, 1885, a deed was written, signed, sealed and acknowledged by Marcus Hulings and wife conveying to The Hulings Lumber Company all of said lands, subject to the vendors' liens still existing upon them for unpaid purchase-money amounting to over \$30,000.00. This deed was placed in the hands of John E. Butler with the understanding, that he was to deliver it to The Hulings Lumber Company, as soon as it should be organized and issue stock in payment for said lands to the corporators. On February 20, 1885, a certificate of incorporation was issued by the secretary of state of West Virginia for said corporation, and on March 28, 1885, the stockholders met and duly organized and elected a board of directors, and on the same day the board of directors met and elected the following officers: Willis J. Hulings, presi-

dent; John E. Butler, treasurer; and D. W. Osborne, secretary. At said meeting the president and secretary were authorized to issue \$150,000.00 of the capital stock of the corporation in payment for said lands, and thereupon at said meeting John E. Butler delivered said deed, and it was duly accepted by the corporation, and the capital stock was issued and delivered in payment for said lands. The corporation took possession of the lands engaged largely in the lumber-business paid off part of the out standing notes for the purchase-money induced F. W. Mitchell & Co. to take up the balance and executed a trust-deed on said lands, dated February 6, 1886, to secure F. W. Mitchell & Co. for the purchase-notes so paid by them. The said deed to The Hulings Lumber Company was duly recorded in Tucker county on April 3, 1885, and in Randolph county on April 20, 1885; and the said trust-deed to secure F. W. Mitchell & Co. was duly recorded in said counties prior to March 6, 1886.

On October 27, 1886, the plaintiff, The Spring Garden Bank, recovered in the Supreme Court of the state of New York, in and for the city of New York, a judgment against Marcus Hulings for \$3,374.00 with costs and damages; making an aggregate sum of \$3,622.07. Upon this judgment this suit is founded. The note upon which said judgment was recovered was given by Hulings on September 29, 1884, but according to the testimony of Marcus Hulings, which is not contradicted, the said note was not negotiated so as to make it a liability upon him until about the middle of June, 1885, more than two months after the date of the deed to The Hulings Lumber Company.

The first question presented is: Is the deed to the Hulings Lumber Company void, because at the date of said deed, the said company had not been incorporated? This inquiry involves the essentials of a valid conveyance of real estate. The law requires more form and solemnity in the conveyance of land than in that of chattels. It is only necessary here to consider conveyance by deed. A deed is a writing sealed and delivered; and to be duly executed it must be written on paper or parchment. Co. Litt. 35*b*. There must of course be both a grantor and grantee to every deed. In order to be

a grantor the party must be *sui juris*, and capable of contracting; but such is not the case with respect to the grantee. Any person capable of holding lands, including corporations, idiots, persons of unsound mind and infants, may be the grantee in a deed. Delivery is an incident essential to the due execution of a deed, for it takes effect only from the delivery. The delivery may be by the grantor to the grantee or to any other person authorized by him to receive it. It may be delivered to a stranger as an escrow, which means a conditional delivery to a stranger to be kept by him until certain conditions be performed and then to be delivered over to the grantee. Generally an escrow takes effect from the second delivery, and is to be considered as the deed of the party from that time; but this general rule does not apply when justice requires a resort to fiction. 4 Kent, Comm. 453; *Fewell v. Kessler*, 30 Ind. 195; *Gilmore v. Morris*, 13 Mo. App. 114. A writing delivered to a stranger for the use and benefit of the grantee, to have effect after certain event or the performance of some condition, may be delivered either as a deed or as an escrow. *Hatch v. Hatch*, 9 Mass. 307; 1 Devl. Deeds, § 275. According to all the authorities delivery, whatever may be its form or the manner in which it is made, is absolutely essential. It is the final act, without which all other acts and formalities are ineffectual; and the deed takes effect only from its actual or constructive delivery. Devl. Deeds § 260; Bish. Cont. § 26; 3 Washb. Real Prop. 300.

The foregoing are elementary principles. The important question however in this cause is: Is the deed from Marcus Hulings and wife to The Hulings Lumber Company void and ineffectual for the want of a grantee? It is admitted that a grant *in præsenti* to a person not *in esse*, at the time the deed is delivered, would be inoperative; and likewise a deed to a corporation never created or organized would be void. *Hulick v. Scovil*, 4 Gilman, 191; *Harriman v. Southam*, 16 Ind. 190; *Russell v. Topping*, 5 Macl. 202. These cases and others of the same character fully sustain the doctrine, that a deed to a corporation not in existence or to one incapable by its charter of holding real estate or to a person not *in esse* at the time of the delivery of the deed is void; but I have

been unable to find any case, in which it has been decided, that a deed made to a corporation having a potential existence at the date of the deed, and which had obtained its charter and completed its organization, at the time the deed was delivered to it, was void or ineffectual as a conveyance to the corporation. On the contrary in *Wharf Co. v. Judd*, 108 Mass. 224, the court held, that a deed conveying land to a corporation dated after the date of its charter and before its organization was a valid conveyance. The court, in its opinion, on page 228, says: "The acceptance of the deed will be presumed as soon as the plaintiffs (the corporation) were competent to take it. *Bank v. Bellis*, 10 Cush. 276; *Ward v. Lewis*, 4 Pick. 518; *Bank v. Dandridge*, 12 Wheat. 64, 70. And these plaintiffs could accept a deed as soon as they became competent to make a contract under their charter." In *Drury v. Foster*, the court, in its opinion, says: "We agree, if one competent to convey real estate sign and acknowledge a deed in blank, and deliver the same to an agent with authority, express or implied, to fill the blank, and perfect the conveyance, its validity could not be well controverted." 2 Wall. 33. As before stated, it is the delivery of the deed, that is the crowning act, which completes its execution, and is as essential to the transmission of the title as the deed itself. Acceptance by the grantee or some one for him, is an essential part of the delivery. It is true, an acceptance, where it is for the benefit of the grantee, will be presumed; still acceptance is a necessary incident to the conveyance. If therefore there is a grantee in existence at the time of delivery, and such grantee accepts the conveyance, I can see no reason either in law or reason, why the conveyance should not be sustained, especially in a case where justice and equity require it. It is the duty of courts to uphold rather than destroy deeds. *Sherwood v. Whiting*, 54 Conn. 330 (8 Atl. Rep. 80); *Flagg v. Eames*, 94 Amer. Dec. 363; *African M. E. Church v. Conover*, 27 N. J. Eq. 157; *Shed v. Shed*, 3 N. H. 432.

In the case before us the incorporators of The Hulings Lumber Company on January 2, 1885, before the deed to it was executed, had duly signed and entered into articles in the form prescribed by the statute, by which they agreed to be-

come a corporation; and at the instance of said corporators Marcus Hulings and wife on the same day, but after said articles had been entered into, signed and acknowledged a deed to the corporation thus agreed upon, and partly created, for the lands in controversy. It is fully proved by both Marcus Hulings and John E. Butler, that this deed was delivered by the Hulings to said Butler to be held by him until The Hulings Lumber Company received its charter and organized, and then, upon the issuance of the stock in payment of the lands as agreed upon, Butler was to deliver the deed to the corporation; and it was also proved, that on March 28, 1885, after said corporation had fully organized under its charter and passed a resolution to accept the deed and issue the capital for the lands, Butler did deliver the deed to the corporation by whom it was accepted and afterwards, on April 3, 1885, duly recorded in Tucker county. It seems to me, that this deed under the facts and circumstances hereinbefore stated was a sufficient conveyance to vest the title to the lands therein mentioned in The Hulings Lumber Company. The said company was, at the time the deed was delivered to and accepted by it, a complete corporation duly chartered and organized; and not only this, but it had at the date of said deed a potential existence and subsequently became an actual and legal corporation. I am therefore clearly of opinion, that said deed did vest in the said Hulings Lumber Company the legal title to said land.

This conclusion renders it unnecessary to consider at any length the other ground, upon which said deed is assailed by the plaintiff's bill. It appears from the testimony of Marcus Hulings, and there is no evidence in the record contradicting him, that the notes, on which the plaintiff obtained its judgment, were wholly without consideration and never became legal and binding obligations upon him, until they passed into the hands of *bona fide* holders, and that no part of them did so pass into the hands of the plaintiff or any person, under whom it claims, until about the middle of June, 1885, which was more than two months after the title to said lands had vested in said company. If therefore it were conceded, that said deed was wholly voluntary and without any valuable consideration, in the absence of any proof of actual

fraud the plaintiff is in no position to assail or complain of it. There is no proof in the record of any actual fraud. On the contrary the answers of both Marcus Hulings and The Hulings Lumber Company deny, that the deed was either fraudulent or made without a valuable consideration. And these answers are supported by the evidence taken by and on behalf of the defendants. The plaintiff offered no evidence on these questions.

For the reasons aforesaid I am of opinion, that the decrees of the Circuit Court should be reversed, and the plaintiff's bill dismissed.

REVERSED. DISMISSED.

CHARLESTON.

FLACK v. FRY, *Mayor*.

*(GREEN, JUDGE, Absent.)

Submitted January 24, 1889.—Decided March 7, 1889.

1. MUNICIPAL CORPORATIONS—ORDINANCES—HABEAS CORPUS.

F was arrested in June, 1887, and brought before the Mayor of the city of Charleston for a violation of one of the city-ordinances in selling beer without license within one mile from the corporation-limits, was tried and convicted by the mayor and fined \$50.00 and costs, and was committed to the street-commissioner, to work out his fine. It appears, that the warrant for his arrest was issued by the recorder, but it does not appear, whether he was arrested within or beyond the city-limits. F. petitioned for and obtained from the Circuit Court of Kanawha county a writ of *habeas corpus*. The return made by the mayor to said writ discloses the facts above stated and also alleges, that F. had violated said ordinance. F. demurred to said return, and upon the hearing the Circuit Court dismissed said writ with costs. **HELD:**

I. The mayor of the city of Charleston had jurisdiction to hear and determine said cause.

II. Under the facts disclosed the Circuit Court acted properly in overruling said demurrer and dismissing said writ of *habeas corpus*.

*On account of illness.

J. W. Malcolm for plaintiff in error.

W. S. Laidley for defendant in error.

ENGLISH, JUDGE:

On the 23d day of June, 1887, one William Flack presented his petition in the Circuit Court of Kanawha county praying a writ of *habeas corpus* be directed to one Foley, one of the policemen of the city of Charleston, commanding him to have the body of petitioner before said court at a time and place to be stated therein, together with the day and cause of his caption and detention, in order that justice might be done in the premises, and petitioner restored to liberty; setting forth in his petition that he was on the —— day of June, 1887, arrested on a warrant issued by Joseph L. Fry, mayor of the city of Charleston, by the police of said city, which warrant charged petitioner with selling whiskey without having first obtained a license therefor from the city council of said city of Charleston; that petitioner lives outside of the corporate limits of said city and is deprived of the privilege of free schools, the protection of the police, and in fact of all privileges and protection conferred by the city of Charleston upon the citizens thereof; and that notwithstanding these facts he is detained and held in custody by said authorities under and by virtue of an alleged judgment rendered as aforesaid by the said mayor of the city of Charleston for an alleged disobedience by petitioner of an ordinance of said city of Charleston, which provides, that the jurisdiction of said city shall extend one mile beyond the corporate limits of the same. Petitioner further represented, that he was a citizen of Charleston district of Kanawha county, and resided out of said corporate limits of said city of Charleston, and as such was not subject to be ordered and controlled by the process of said mayor's court in respect of the matters alleged against him; and further that there was no law, which authorized the mayor to issue a warrant of arrest against petitioner, cause him to be arrested and brought into the jurisdiction of the city, and to try and convict said petitioner as said mayor did, and that any ordinance of said city based upon any statute, which seems to give authority to said city to go out of the corporate limits of said city

and interfere with citizens out of said corporation as aforesaid, is unconstitutional and void.

Joseph L. Fry, mayor of the city of Charleston, answered said petition stating, that he was the mayor of said city, and in obedience to said writ he produced the body of William Flack, and that as such mayor he was invested with all the rights, powers and duties conferred upon him by the several acts of the Legislature of West Virginia pertaining to the city of Charleston and to municipal corporations in general; that the city of Charleston has police jurisdiction for one mile beyond the corporate limits of the city, and to carry out this police jurisdiction the common-council has power to adopt all needed ordinances and by-laws not contrary to the laws of the state; and that in pursuance of said authority the common-council of said city had theretofore adopted an ordinance entitled: "An ordinance relating to the city license," setting the same forth *in extenso* in his answer. Section 1 of said ordinance provides: "that no person without first having obtained a city license therefor shall sell, offer or expose for sale spirituous liquors, beer *etc.* within the city-limits or within one mile thereof either on land or on the Kanawha or Elk rivers," *etc.* Section 11 of said ordinance provides, that any person violating the first section shall in addition to the other penalties prescribed for sales or gifts of spirituous liquors, *etc.* in violation of the prohibitions mentioned in the bond required in section 6, be fined not less than \$20.00 nor more than \$100.00 with costs.

Said Joseph L. Fry further stated by way of answer, that the said William Flack on May 29, 1887, violated said ordinance and did sell beer within one mile of the city-limits, and complaint was duly made to respondent as mayor of said city on the 1st day of June, 1887, that said Flack was violating said first section of said ordinance, and on that day a warrant was issued for said Flack based on said complaint, and he was duly arrested and brought before respondent for trial for infraction of said ordinance; and on the 10th of June said Flack was tried and convicted upon said charge and was fined \$50.00 and costs, which failing to pay he was committed to the street-commissioner of the city of Charleston to work out said

fine; and respondent filed with his answer copies of the complaint, warrant and testimony produced by the city of Charleston in support of said cause; and on the filing of said answer the petitioner, William Flack, demurred to said answer, in which demurrer the respondent joined, and, the matters of law arising upon said demurrer to said answer having been argued by counsel and considered by the court, the court overruled said demurrer, and said writ of *habeas corpus* was dismissed with costs.

From this order of the Circuit Court a writ of error was awarded to said William Flack to this Court; and the plaintiff in error assigned as error, that the Circuit Court erred in overruling the demurrer; that the return to the writ of *habeas corpus* together with the records and proofs filed therewith in the proceedings, under which said Flack was arrested, tried, fined and held in custody by said mayor, clearly showed, that the said mayor had no jurisdiction in the premises, and that his proceedings were null and void.

The offence, with which the plaintiff in error was charged was a violation of section 1 of the ordinances of the city of Charleston relating to license in selling beer without license out of the city-limits and within a mile thereof, which section provides, that no person without having first regularly obtained a city-license therefor shall sell beer *etc.* within the city-limits or within one mile thereof.

The Code, c. 47, s. 33, provides, that no license to sell beer *etc.* within such town or village or within one mile of the corporate limits thereof, unless it be within another city or town, shall be authorized or granted, except as provided in chapter 32 of the Code; that is, on application to the County Court. Section 1 of said chapter 47 provides, that the municipal authorities of a city, town, or village heretofore established, other than the city of Wheeling, may exercise all the powers conferred by this chapter, and, so far as powers are conferred on a city, town or village not conferred by the charter of any such city, town, or village, the same shall be deemed an amendment to said charter. This provision from section 33 would constitute an amendment to the charter of the city of Charleston, and would cause the charter of said city to expressly forbid the sale of beer *etc.* within one

mile of the corporation limits, unless the party so selling was licensed by the County Court. Section 1, then, of said ordinance of the city of Charleston would be in pursuance of the express provisions of the charter of said city; and by section 31 of the charter of said city (chapter 39, Acts 1875) it is made the duty of the mayor of said city to take care, that all by-laws, ordinances and orders of the council are faithfully executed. Under the fourth clause of section 1, p. 1000, of the Code it is provided, that every city, town and village by its corporate authorities in the exercise of its police force and fiscal affairs may impose a license-tax for any privilege, for the exercise of which the state imposes a license-tax, and for the right to tax such privilege and for the purpose of enforcing the same and such police regulations, as may be prescribed for such city, town or village the jurisdiction of every city, town or village shall extend one mile beyond the corporate limits of any such city, town or village as prescribed by the act of its incorporation.

This statute was in force at the time the case of *Kaufle v. Delaney*, 25 W. Va. 410, was before this Court, in which it was held, that the section, from which the above quotations was taken authorizing municipal corporations to impose a license-tax for the exercise of certain privileges out of and within one mile of their corporate limits, does not authorize the imposition of such tax for general municipal purposes, but only for the liquidation of bonds issued under the authority of said act. Subsequent to that decision however and before the arrest of the plaintiff in error the council of the city of Charleston passed the following ordinance, to wit: "The sergeant is hereby instructed, whenever he collects any license-tax on any business carried on outside of the limits of the city to pay the same over to the treasurer of the city to the credit of the consolidated sinking fund, and the city treasurer is hereby instructed to place to the credit of said fund any moneys so paid to him by the sergeant; said tax being imposed and collected solely for the purpose of discharging the bonds of the city." This, then, would remove the objection raised by the plaintiff in error in his assignment of errors, and would also remove the only objection which seems to have occurred to the court at the time

Kaufle v. Delaney, *supra*, was decided, in the way of the collection of license-tax from parties out of the city limits and within one mile thereof. It does not therefore seem to me, that the city authorities in making the arrest of the plaintiff in error under the circumstances of this case and in proceeding to hear and determine the charges against him exceeded their jurisdiction or acted *ultra vires*, as section 11 of said ordinance provides, that any person violating the first section in addition to the other penalties prescribed for sales or gifts of spirituous liquors, beer *etc.* in violation of the provisions mentioned in the bond required in section 6, shall be fined not less than \$20.00 or more than \$100.00 with costs.

It is however assigned as additional error in the proceeding, that the Circuit Court erred in overruling the demurrer of said plaintiff in error, because it appeared by the answer to said writ, that the warrant was issued by the recorder, who had no authority to issue and sign warrants. Code c. 47, s. 40, which must be regarded as amending the charter of said city, provides, that in the absence from the city, town or village, or in the sickness of the mayor, during any vacancy in the office of the mayor the recorder shall perform the duties of the mayor and be invested with all his powers. This Court will presume, that one of these circumstances occurred, and that the recorder acted in the line of his duty in issuing said warrant, if indeed he issued it.

Said answer is to be taken as true upon demurrer, and it states, that said Flack was violating the first section of said ordinance by selling beer, and complaint was made to the mayor of said city on the 1st of June, 1887, and on said complaint he was duly arrested and brought before the mayor for trial, and on the 10th day of June the mayor tried him and convicted him upon said charge and fined him \$50.00 and costs. It does not appear where he was arrested.

Under this state of facts I am of opinion, that the demurrer was properly overruled, and the judgment of the Circuit Court must be affirmed, and the plaintiff in error must pay the costs of the writ of error and of the court below.

AFFIRMED.

CHARLESTON.

SEARLE v. RAILWAY Co.

*(GREEN, JUDGE, absent.)

Submitted January 24, 1889.—Decided March 9, 1889.

1. RAILWAY COMPANIES—DAMAGES—DECLARATION—DEMURRER—SURPLUSAGE.

In an action under our statute Code, c. 103, to recover damages for causing the death of a party the declaration is not demurrable, simply because it names the widow and children of the defendant and avers, that the damages claimed by the plaintiff accrued to them. Such parts of the declaration will be treated as surplusage. (p. 372.)

2. RAILWAY COMPANIES—DECLARATION.

The declaration in an action under said statute, which avers, that the decedent was killed by the oversetting and throwing down of the railroad car, in which he was at the time being carried by the defendant as a passenger, and that said oversetting and throwing down of the car were caused by the negligence of the defendant, is not demurrable, on the ground that the allegation is too general. (p. 373.)

3. RAILWAY COMPANIES—NEGLIGENCE—INSTRUCTIONS.

The following instructions are not erroneous in an action brought under said statute to recover damages for the causing of the death of a husband and parent by the negligence of a railroad company: "(2) The law in tenderness to human life and limbs holds railroad companies liable for the slightest negligence and compels them to repel by satisfactory proofs every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require, that they be held to the greatest possible care and diligence. (3) The Kanawha & Ohio Railway Company as a common carrier of passengers was bound to exercise the utmost degree of diligence and care in safely transporting Daniel Searles upon his journey. (4) The slightest neglect, against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, renders such company liable in damages for such death. (5) Said railroad company is held by the law to the utmost care not only in the management of its trains and cars but also in the structure, repair and care of the track and bridges and all other arrangements necessary to the safety of passengers. (6) The jury are instructed that in estimating the pecuniary injury they

*On account of illness.

32	370
36	309
32	370
37	610
32	370
39	93
32	370
38	43
38	456
32	370
42	709
32	370
43	810
32	370
48	619
32	370
54	403
54	404
32	370
56	556
57	302
57	303
32	370
58	223
32	370
62	293

may take into consideration the nurture, instruction, and physical, moral, and intellectual training, which the children would have received from their father. (7) The jury are instructed that while they must assess the damages with reference to the pecuniary injuries sustained by the distributees in consequence of the death of Daniel Searles, they are not limited to the losses actually sustained at the precise period of his death, but may include also prospective losses, provided they are such as the jury believe from the evidence will actually result to the distributees as the proximate damages arising from the wrongful death." (p. 374.)

G. S. Couch for plaintiff in error.

Gunn & Gibbons for defendant in error.

SNYDER, PRESIDENT :

Action of trespass on the case commenced in June, 1886, by T. M. Harbour, as administrator of Daniel Searles deceased, against the Kanawha & Ohio Railway Company in the Circuit Court of Mason county. There was a demurrer to the declaration, which was sustained ; and then an amended declaration was filed, to which and to each count thereof the defendant demurred, and this demurrer was overruled. Issue was joined on the plea of not guilty and upon two special pleas denying, that the plaintiff was or ever had been administrator of Searles. The action was tried by jury, and a verdict returned for the plaintiff for \$3,000.00, which the defendant moved the court to set aside ; but the court overruled this motion and entered judgment on the verdict, and the defendant obtained this writ of error.

The defendant in error complains, that the Circuit Court erred in sustaining the demurrer to the original declaration. The record shows, that, after the court sustained this demurrer, the plaintiff was given leave to file an amended declaration, which he afterwards did without objection. This operated as a waiver of any objection to the action of the court in sustaining said demurrer, and the amended declaration, when filed, superseded the original and became the only declaration in the case. It is too late to make an objection of this character for the first time in the appellate court.

The plaintiff in error, the railway company, insists, that the court erred in overruling the demurrer to the amended declaration : *first*, because each of its three counts are bad,

for the reason that they allege the damages claimed by the plaintiff accrued to the widow and children of the intestate; and *second*, because the second count is bad, for the further reason that it fails to aver, how and in what respect the defendant was negligent.

1. Each count of the declaration after alleging, that the plaintiff's intestate was killed by the negligence of the defendant while being carried as a passenger upon one of its trains, avers, that by reason of the premises the said widow and children of the decedent (naming each of them) have sustained damages to the amount of \$10,000.00. And in its general conclusion the declaration avers, that by reason of the matters contained in the first, second and third counts and by force of the statute an action has accrued to the plaintiff, as administrator as aforesaid, to have and demand from the defendant damages to the amount of \$10,000.00. In *Railroad Co. v. Gettle*, 3 W. Va. 376, which was an action brought under chapter 98, Acts 1863, it was held, that the declaration was fatally defective, for the reason that it failed to aver, that the decedent had a widow or next of kin. After that decision the statute was changed so as to provide, that the amount recovered shall be distributed to the parties entitled under the law to the personal estate of a decedent, but it shall not be liable for his debts, instead of providing, as the statute then did, that the amount recovered shall be for the exclusive benefit of the widow and next of kin of the decedent. Since this modification of the statute it has not been regarded as essential, that the declaration should aver, that the decedent had a widow or next of kin, or mention his distributees by name or otherwise, and I think such is the proper interpretation of the statute. *Railroad Co. v. Wightman*, 29 Gratt. 431. But while it is not necessary to name the distributees and allege, that the action is for their benefit, still I do not think the making of such averment will be fatal to the declaration, but that it ought to be treated simply as surplusage. It seems to me, this should be so treated under the Code c. 125, s. 29, which declares that on demurrer no defect shall be regarded, unless it be so essential, that judgment can not be given according to law and the very right of the case. I think therefore this objection is not well taken.

2. The other ground relied on in support of the demurrer is, that the second count of the declaration is too general, in that it fails to aver, how or in what manner the defendant's car was upset and thrown down, whether by a defect in the car, the track, or by the carelessness of its employes or otherwise. The averment is in substance as follows: The defendant not regarding its duty conducted itself so carelessly, negligently and unskillfully, that by reason thereof and the default of the defendant and its servants and for the want of due care and attention the car, in which the said Searles was being carried, was upset and thrown down, by means whereof the said Searles was greatly wounded and injured, and by reason thereof he died. Under the decision of this Court in *Blaine v. Railroad Co.*, 9 W. Va. 252; *Hawker v. Railroad Co.*, 15 W. Va. 628; and *Bern v. Coal Co.*, 27 W. Va. 285,—we must overrule this objection to the declaration and hold, that its averments are sufficient. It avers, that the decedent was killed by the upsetting and throwing down of the car, and that this was caused by the negligence of the defendant. This, it seems to me, is a sufficient averment of the negligent act, which caused the injury, under the law of this state as modified by our statutes, though it may not be such as required by the rigid rules of pleading of the common law. 2 Thomp. Neg. 1246 § 26; *Railroad Co. v. Dunlap*, 29 Ind. 426; *Railroad Co. v. Harwood*, 90 Ill. 425. The demurrer to the declaration was therefore properly overruled.

It is further assigned as error by the plaintiff in error, that the court improperly refused to instruct the jury, that the evidence of the plaintiff was insufficient to prove, that the plaintiff was or ever had been legally appointed administrator of Daniel Searles. In order to prove such appointment the plaintiff introduced an order of the County Court of Putnam county dated March 15, 1886, in these words: "The clerk of this court presented here a list of fiduciary appointments by him made in vacation since the first day of the last regular term of this court, which list being seen and inspected by the court, it is ordered, that each of the appointments be, and the same is hereby, confirmed." In connection with this order the plaintiff read in evidence a

list from which it appears, that the plaintiff was appointed administrator of said Daniel Searles on February 27, 1886. It is contended, that this was simply a private list of the clerk, and that the order of confirmation referred to this list and did not therefore confirm any appointment, of which the clerk had made a record as required by the statute. It would certainly have been better, and more formal for the order of the County Court to show, that the clerk had reported, that is, exhibited to the court the record of the appointments made by him in vacation; but in the absence of any fact tending to show, that the list referred to in said order was not the recorded list of the clerk, it seems to me, this Court ought to presume, that it was the recorded list, and that the order of confirmation referred to the appointments made and recorded by the clerk. To hold otherwise would be extremely technical and, I think, unwarrantable.

The court gave to the jury eight instructions at the instance of the defendant and the same number at the request of the plaintiff. To the giving of the latter or any of them the defendant objected; but no objection is made to any of them in this Court except Nos. 2, 5, 6, and 7, which are in these words:

“(2) The law in tenderness to human life and limbs holds railroad companies liable for the slightest negligence and compels them to repel by satisfactory proofs every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require, that they be held to the greatest possible care and diligence. Any negligence or default in such cases makes such carriers liable in damages under the statute.”

“(5) Said railroad company is held by the law to the utmost care not only in the management of its trains and cars but also in the structure, repair and care of the track and bridges and all other arrangements necessary to the safety of passengers.

(6.) The jury are instructed, that in estimating the pecuniary injury they may take into consideration the nurture, instruction and physical, moral and intellectual training, which the children would have received from their father.

(7.) The jury are instructed, that, while they must assess the damages with reference to the pecuniary injuries sustained by the distributees in consequence of the death of Daniel Searles, they are not limited to the losses actually sustained at the precise period of his death but may include also prospective losses, provided they are such as the jury believe from the evidence will actually result to the distributees as the proximate damages arising from the wrongful death."

Of the said instructions, Nos. 2 and 5 are literal copies of instructions given and approved by the appellate court in *Railroad Co. v. Wightman*, 29 Gratt. 431. In reference to these instructions the court in that case at page 445 says: "We do not deem it necessary to enter into any discussion of the propositions of law involved in these instructions. It is sufficient to say that they are fully sustained by the elementary writers, and by the opinions of the most respectable courts in this country. The decisions on this subject are given in Whart. Neg. §§ 627, 661, inclusive; also section 422, and the notes to these sections; Redf. Carriers & Bailees § 346; *Farish v. Reigle*, 11 Gratt. 697."

It is however earnestly insisted by the counsel for the plaintiff in error, that the concluding sentence of said instruction No. 2, to-wit: "Any negligence or default in such cases makes such carriers liable in damages under the statute,"—is unquestionably wrong, because to justify a recovery two things must concur: *first*, negligence by the defendant; and *second*, such negligence must have contributed to the injury sustained. It is certainly true, that it is the conjunction of the negligence and the injury, which creates the tort. Mere negligence does not become an actionable wrong, unless the other element is found in the same case, namely, an injury or damage suffered in consequence of the negligence or wrong. Cooley on Torts, 62; 2 Greenl. Ev. § 256. It is therefore, apparent that this sentence taken alone does not propound a correct legal proposition; but, if considered in connection with the other instructions submitted with it, in one of which the jury were told, that, if they find from the evidence, that the negligence of the defendant in nowise contributed to or occasioned the accident,

then they must find for the defendant, I do not think it so objectionable as to warrant a reversal of the judgment. Instructions Nos. 6 and 7 are substantially the same as, and were evidently copied from, two instructions, which were fully considered and approved by the court of appeals of New York in *Tilley v. Railroad Co.*, 29 N. Y. 252. The New York statute, under which that case was determined provided, that "the jury may give such damages, as they shall deem a fair and just compensation not exceeding \$5,000.00 with reference to the pecuniary injuries resulting from such death to the wife or next of kin of such deceased person." Laws 1849, p. 388. It was therefore contended in that case, that the recovery must be limited and confined to a pecuniary loss flowing necessarily from the death. And in support of that view counsel cited many English and American cases, in which it was held, that the damages must be assessed with reference to the pecuniary loss resulting from the death of the person injured, and that neither the physical pain of the deceased nor the mental sufferings of the surviving family can be taken into the estimate. See also *Shear. & R. Neg.* § 610; *Field, Dam.* § 630, and cases cited. The court in a unanimous opinion, says:

"The charge of the judge was explicit, that the damages must be limited to pecuniary injuries; and he said, that in estimating them they had a right to consider the loss, that is the pecuniary loss, which the children had sustained in reference to their mother's nurture and instruction, and moral, physical and intellectual training. I think this does not imply, that the children are necessarily and inevitably subjected to such loss, but leaves it to the jury to determine, whether any such loss has been in fact sustained, and, if so, the amount of such loss. This is the fair scope and meaning of the charge, and, if it was not sufficiently explicit, it should have been made so by a direct request for such purpose. This understood, I regard it as unexceptionable." *Tilley v. Railroad Co.*, 29 N. Y. 285. * * * * "Nor do I think it was erroneous to instruct the jury, that, while they must assess the damages with reference to the pecuniary injuries sustained by the next of kin in consequence of the death of

Mrs. Tilley, they were not limited to the losses actually sustained at the precise period of her death, but might include also prospective losses, provided they were such as the jury believe from the evidence would actually result to the next of kin as the proximate damages arising from the wrongful death,"—citing *Tilley v. Railroad Co.*, *Tilley v. Railroad Co.*, 29 N. Y., 285, 24 N. Y. 473-477.

The foregoing views fully sustain the instructions here complained of, and, I think, they are consonant with reason and the purpose of the statute; and, if correct in that case, they are more truly so in the case at bar, because our statute does not like the New York statute, limit the compensation "to the pecuniary injuries resulting" *etc.*, but it provides: "In every such action the jury may give such damages, as they shall deem fair and just not exceeding ten thousand dollars." Code 1887, c. 103, s. 6. It will thus be observed, that our statute does not in terms limit the jury to giving compensation for pecuniary injuries, though such is perhaps its purpose and implied meaning; but still, as it is not express, the limitation ought not to be applied strictly.

It is further contended, that instruction No. 6 was improper, because there was no evidence tending to support it. This is a mistake. There was evidence submitted to the jury, that the decedent was forty two years old, made his living by days' work and laboring on his farm, had a wife and nine children, all of whom were living at the time of the trial; the oldest child was nineteen years of age, and the youngest sixteen months; that he was a church member, moral, religious and industrious in his habits, a kind husband and parent and had been sending his children to school. As was said by this court in *Dimmey v. Railroad Co.*, 27 W. Va. 32, 57, quoting from *Tilley v. Railroad Co.*, 29 N. Y. 283: "Within the statute as to amount and the species of injuries sustained the matter is to be submitted to the sound sense and justice of the jury. They must be satisfied, that pecuniary injuries resulted. If so satisfied, they are at liberty to allow them from whatever source they actually proceeded which could produce them. If they are satisfied, from the history of the family or the intrinsic probabilities of the case, that they were sustained by the loss of bodily care

or intellectual culture or moral training which the mother had before supplied, they are at liberty to allow for it. The statute has set no bounds to the sources of these pecuniary injuries. If the rule is a dangerous one, and liable to abuse, the legislature, and not the courts, must supply the corrective." If it was proper for the jury to consider these sources of injury, surely the defendant could not be prejudiced by having the jury instructed in respect to them. The instruction was therefore not improper.

A new trial was not asked on the ground that the verdict was contrary to the evidence, but only upon the ground that the court mis-directed the jury. Having determined, that there was no error in the instructions to the jury, we must hold, that the motion for a new trial was properly overruled. If we had been asked to set aside the verdict on the ground, that it was not sustained by the evidence, we should have refused to do so, because the evidence, to say the least of it, does tend to support the verdict, and, this being a case involving negligence, which is a mixed question of law and fact, and one peculiarly within the province and control of the jury, we would not disturb the verdict, unless the facts distinctly showed, that there was no negligence. *Washington v. Railroad Co.*, 17 W. Va. 190; *Johnson v. Railroad Co.*, 25 W. Va. 570.

Having found no error, for which the judgment of the Circuit Court should be reversed, I am of opinion, that said judgment should be affirmed.

AFFIRMED.

CHARLESTON

McCUTCHEON v. INGRAHAM.

*(GREEN, JUDGE, absent.)

Submitted January 22, 1889.—Decided March 12, 1889.

1. RESCISSION OF CONTRACT—VENDOR'S LIEN.

On the 12th day of April, 1882, M. executed to I. a deed of conveyance for certain lots of land in Greenville Wirt county, W.

*On account of illness.

Va., in consideration of \$600.00, \$200.00 of which was paid in cash, and the residue to be paid in one, two, three and four years after date, in payments of \$100.00 each, and the vendor's lien was retained to secure the payment of said deferred instalments. In 1884, I. insured the house situated on said lots in the North British & Mercantile Insurance Company for \$500.00; and the said house was destroyed by fire February 5, 1886. Subsequently an agreement in writing dated in January, 1885, was entered into between M. and I., whereby it was stipulated, that I. should remain in possession of said lots until the 1st day of March, 1886, on the following conditions, viz: That she, the said I., should take care of said property keep the taxes paid up to that date and peaceably surrender possession of said property to the said M., give up the deed, which she then held, and the said M. should give up the notes she might then hold against said I., and the whole former trade or sale of the property should be rescinded; but if the said I. should meet all the payments due to that date with a probability of meeting the remaining deferred payments, then the original contract to remain in full force; otherwise to be null and void. Upon a bill filed in June, 1886, to enforce said vendor's lien against I., she filed said agreement of January, 1885, with her answer and relied upon the same as a release of said vendor's lien and a rescission of the contract to pay the residue of said purchase-money. **HELD:**

I. By said agreement of January, 1885, said vendor's lien was released, and the contract to pay the residue of said purchase-money was rescinded.

RESCISSION OF CONTRACT—INSURANCE.

II. Notwithstanding said agreement to rescind said contract of sale, until said rescission was consummated by exchange of deed and notes, the defendant, I., still retained an insurable interest in said property on the 5th of February, 1886, when said property was destroyed by fire, and was entitled to the benefit of said policy of insurance.

Beard & Lockhart for appellant.

V. B. Archer for appellee.

ENGLISH, JUDGE:

On the 25th day of April, 1882, Elizabeth D. MacCutcheon conveyed to Rachel C. Ingraham four town-lots in the town of Greenville in the county of Wirt and state of West Virginia in consideration of \$600.00, \$200.00 of which was paid down in cash, and the remaining \$400.00 was to be paid in four instalments, the first to be paid on the 1st

day of May, 1884, and the residue in one, two and three years thereafter with interest from date, and to secure the payment of said deferred instalments the vendor's lien was reserved. On the 1st day of August, 1884, said R. C. Ingraham paid the sum of \$40.00 on said first note and has paid nothing since. In June, 1884, said R. C. Ingraham insured said house for \$500.00 in the North British & Mercantile Insurance Company. On the 31st day of January, 1885, an agreement in writing was entered into between said E. D. MacCutcheon and Rachel Ingraham, wherein it was covenanted, that the said Rachel Ingraham should remain in peaceable possession of the property aforesaid until the 1st day of March, 1886, on the following conditions, viz: That said R. Ingraham should take good care of said property keep the taxes paid up to that date and peaceably surrender possession of the same to said E. D. MacCutcheon and give up the deed, which she then held, said E. D. MacCutcheon to give up the notes she may then hold against the said R. Ingraham, and the whole former trade or sale of the property should be rescinded; but if the said Rachel Ingraham should meet all the payments due to that date with a probability of meeting the remaining deferred payments, then the original contract was to remain in full force; otherwise to be null and void.

In the month of February, 1886, the house situated on said lots was destroyed by fire together with some personal property belonging to the defendant, Rachel Ingraham. On the first Monday in July, 1886, the said Elizabeth D. MacCutcheon filed a bill in equity in the Circuit Court of Wirt county to enforce the vendor's lien reserved on the face of said deed, and to recover the residue of the purchase-money, which was then due from said Rachel Ingraham to plaintiff on said lots or parcels of land upon the notes in said deed described, and made Rachel Ingraham, The North British & Mercantile Insurance Company and J. R. Timms, agent, and in his own right defendants; and by way of auxiliary process she sued out an attachment in said suit and designated the defendant, J. R. Timms, agent of said insurance company, as being indebted to or having in his possession or under his control the effects of said Rachel Ingraham, who

was summoned to answer at the next term of said Circuit Court; and on the 30th day of June, 1886, said Timms, as agent of said insurance company, filed his answer in writing in open court, as garnishee, disclosing, that he had in his possession a draft for \$500.00, payable to Miss R. C. Ingraham, to pay the loss on said property. On the 26th day of October, 1886, the defendant R. C. Ingraham demurred generally to the plaintiff's bill, which demurrer was subsequently overruled.

On the 29th day of March, 1887, the defendant Rachel Ingraham filed her answer to the plaintiff's bill, and the plaintiff replied generally thereto. In said answer said defendant admitted the purchase of the lots in the bill mentioned at the price therein stated. She filed the deed from plaintiff as an exhibit with her answer and admitted, that the notes executed by her to the plaintiff were correctly stated in plaintiff's bill. She however denied, that she owed the plaintiff on the 10th of June, 1886, \$331.00 on account of the three notes then due, and claimed a set-off of \$13.00 on account of taxes she was compelled to pay for plaintiff. She admitted, that she had the dwelling-house insured in the year 1884 for the sum of \$500.00 and claimed, that being the owner she had a right so to do; and alleged, that said dwelling-house having been destroyed by fire on the 5th day of February, 1886, by such destruction the money mentioned in the policy became due and payable to her. She denied that said lots were worth only \$75.00 and claimed that they were worth \$250.00 or \$300.00. She further alleged, that in order to collect said insurance-money she was compelled to sue said insurance-company in the county of Wood, and that the jury gave her a verdict for \$500.00 but at great cost and expense to her; that said sum was paid into the hands of one R. Huber Smith, the receiver of said Circuit Court of Wood county, where the same still remains; and that said sum of money had never at any time been under the control or in the possession of said defendant. She denied, that plaintiff was entitled in equity to any portion of said insurance-money, because she is indebted to plaintiff for the purchase-money, or because she has occupied said property. She denied, that she agreed to have said prop-

day of May, 1884, and the residue in one, two and three years thereafter with interest from date, and to secure the payment of said deferred instalments the vendor's lien was reserved. On the 1st day of August, 1884, said R. C. Ingraham paid the sum of \$40.00 on said first note and has paid nothing since. In June, 1884, said R. C. Ingraham insured said house for \$500.00 in the North British & Mercantile Insurance Company. On the 31st day of January, 1885, an agreement in writing was entered into between said E. D. MacCutcheon and Rachel Ingraham, wherein it was covenanted, that the said Rachel Ingraham should remain in peaceable possession of the property aforesaid until the 1st day of March, 1886, on the following conditions, viz: That said R. Ingraham should take good care of said property keep the taxes paid up to that date and peaceably surrender possession of the same to said E. D. MacCutcheon and give up the deed, which she then held, said E. D. MacCutcheon to give up the notes she may then hold against the said R. Ingraham, and the whole former trade or sale of the property should be rescinded; but if the said Rachel Ingraham should meet all the payments due to that date with a probability of meeting the remaining deferred payments, then the original contract was to remain in full force; otherwise to be null and void.

In the month of February, 1886, the house situated on said lots was destroyed by fire together with some personal property belonging to the defendant, Rachel Ingraham. On the first Monday in July, 1886, the said Elizabeth D. MacCutcheon filed a bill in equity in the Circuit Court of Wirt county to enforce the vendor's lien reserved on the face of said deed, and to recover the residue of the purchase-money, which was then due from said Rachel Ingraham to plaintiff on said lots or parcels of land upon the notes in said deed described, and made Rachel Ingraham, The North British & Mercantile Insurance Company and J. R. Timms, agent, and in his own right defendants; and by way of auxiliary process she sued out an attachment in said suit and designated the defendant, J. R. Timms, agent of said insurance company, as being indebted to or having in his possession or under his control the effects of said Rachel Ingraham, who

was summoned to answer at the next term of said Circuit Court; and on the 30th day of June, 1886, said Timmis, as agent of said insurance company, filed his answer in writing in open court, as garnishee, disclosing, that he had in his possession a draft for \$500.00, payable to Miss R. C. Ingraham, to pay the loss on said property. On the 26th day of October, 1886, the defendant R. C. Ingraham demurred generally to the plaintiff's bill, which demurrer was subsequently overruled.

On the 29th day of March, 1887, the defendant Rachel Ingraham filed her answer to the plaintiff's bill, and the plaintiff replied generally thereto. In said answer said defendant admitted the purchase of the lots in the bill mentioned at the price therein stated. She filed the deed from plaintiff as an exhibit with her answer and admitted, that the notes executed by her to the plaintiff were correctly stated in plaintiff's bill. She however denied, that she owed the plaintiff on the 10th of June, 1886, \$331.00 on account of the three notes then due, and claimed a set-off of \$13.00 on account of taxes she was compelled to pay for plaintiff. She admitted, that she had the dwelling-house insured in the year 1884 for the sum of \$500.00 and claimed, that being the owner she had a right so to do; and alleged, that said dwelling-house having been destroyed by fire on the 5th day of February, 1886, by such destruction the money mentioned in the policy became due and payable to her. She denied that said lots were worth only \$75.00 and claimed that they were worth \$250.00 or \$300.00. She further alleged, that in order to collect said insurance-money she was compelled to sue said insurance-company in the county of Wood, and that the jury gave her a verdict for \$500.00 but at great cost and expense to her; that said sum was paid into the hands of one R. Huber Smith, the receiver of said Circuit Court of Wood county, where the same still remains; and that said sum of money had never at any time been under the control or in the possession of said defendant. She denied, that plaintiff was entitled in equity to any portion of said insurance-money, because she is indebted to plaintiff for the purchase-money, or because she has occupied said property. She denied, that she agreed to have said prop-

erty insured, and to assign the policy to plaintiff, if plaintiff would not sue her. She then recited the agreement in writing hereinbefore stated as having been entered into between her and plaintiff on the 31st day of January, 1885, and claimed, that she fully complied with said agreement, and for that reason the sale of said property to her is wholly and fully rescinded and annulled under the terms of said agreement. She claimed, that since the 1st of March, 1886, the plaintiff had taken possession of said property and rented it to others. She tendered a deed re-conveying said property and demanded, that said notes be surrendered to her. She also alleged, that she proposed to surrender said property to plaintiff soon after said dwelling was burned, if plaintiff would surrender to her said notes; but plaintiff refused and brought this suit to enforce her supposed lien, which had been rescinded and annulled by said agreement *etc.*

A considerable number of depositions was taken on both sides and filed in the cause, hearing principally upon the questions raised by the attachment-proceedings and the value of the lots, after the house was burned, and the rental value of the property while occupied by said defendant, and its present rental value; and on the 29th day of June, 1887, the cause came on to be heard upon the papers formerly read and proceedings theretofore had, and the proofs filed; and the court decided to enforce the vendor's lien on the property described in the bill and decree, that the plaintiff recover from the defendant, Rachel C. Ingraham, the sum of \$480.36 with interest to the 29th day of June, 1887, and directed a sale of said lots by a special commissioner therein appointed, unless said amount and costs were paid in thirty days from the date of said decree, after the giving of bond and the advertising of the property as therein directed. The said Rachel C. Ingraham however in her answer claimed, that by the terms of the agreement made and entered into between herself and the plaintiff, E. D. MacCutcheon, on the 31st day of January, 1885, she, respondent, was to remain in possession of said property until the 1st day of March, 1886, to take good care of said property and keep the taxes paid up to that date, and on that day she was to surrender possession of said property to plaintiff and also surrender the deed, and

plaintiff was to give up the notes she then held, and the whole former trade was to be rescinded; and the only clause in said agreement, which would confer upon her the right to insist upon said original contract was the one, which provided, that if the defendant should meet all the payments due to that date, meaning the 1st day of March, 1886, with a probability of meeting the remaining deferred payments, the original contract should remain in full force; otherwise it was to be null and void. She further alleges, that she complied with said contract so far as paying taxes and caring for the property was concerned, but that being unable to pay any part of said deferred payments of purchase-money then due she failed to make said payments, nor was there any probability of her meeting said deferred payments; and she charges, that the said contract and the sale of said property is wholly rescinded and annulled under and by the terms of said agreement.

Upon examination of said agreement it seems to us, that the defendant, Rachel C. Ingraham, is correct in the construction which she places thereon. She was to be allowed to retain peaceable possession of said property until the 1st day of March, 1886, upon condition, that she should take good care of the same and pay the taxes up to that date, and then she was to peaceably surrender possession of said property to the plaintiff and give up the deed she held, and the plaintiff was to give up the notes, which she then held against the said Rachel, and the whole former trade or sale of the property should be rescinded. The residue of said contract merely conferred upon said Rachel the right to keep said property, if she met the payments promptly, and there was a probability of her meeting the payments, that would fall due after the 1st of March, 1886. The defendant appears to have paid the taxes at considerable inconvenience to herself and to have used ordinary diligence in caring for the property, and nothing in the testimony taken in the cause shows, that she was to blame for the destruction of the house, which occurred, when she was absent from home on a visit, she having left it in the care of a party, who had made his home with her, and who swears she took good care of it. Said defendant tenders the deed with her answer and also a deed

reconveying the property to plaintiff and demands a surrender of the notes held by plaintiff.

Giving, then, the agreement aforesaid of January 31, 1885, the construction, we have indicated, it would operate as a complete answer to the plaintiff's bill, so far as that bill seeks to enforce the vendor's lien, and would entitle the defendant Rachel C. Ingraham to a surrender of her notes upon the return of the deed and re-conveyance of the title, which she offered to make in the answer filed by her in this cause. The plaintiff in her bill however alleged, that the draft for the sum of \$500.00 in the possession of said Timms, as agent for said insurance company, was for the express purpose of paying the loss on the identical house sold by plaintiff to defendant, Ingraham, which was destroyed by fire in February, 1886; that it is just, equitable and right, that she should have the full benefit of said insurance-policy,—the defendant having never paid more than about one third of the purchase-money on said house and lots, and having used and enjoyed the same for about four years without paying any part of the deferred purchase-money, save and except the sum of \$40.00, with which, she is duly credited. She further says, that her vendor's lien is a lien on said policy of insurance, and that said draft in the hands of said Timms, agent as aforesaid, is subject to the lien for the deferred purchase-money, and that it was agreed between the defendant and herself, that, if the plaintiff would hold up and not sue her on said purchase-money for said property, she, defendant, would get said property insured in some good company and assign the benefit of the policy of insurance to plaintiff to indemnify her against loss and damage in case of fire; that said Ingraham did insure said house in said insurance-company but failed and refused to assign the benefit thereof to plaintiff and now refuses to pay plaintiff any part of said policy; and she prays judgment against said J. R. Timms, agent and garnishee. Said Rachel Ingraham in her answer denies, that the lien retained in said deed is a lien on said policy of insurance or on the draft in the hands of said Timms; or that the same or the money realized thereon is subject to said lien; and calls for proof. She also denies, that she agreed with the plaintiff to have said house insured,

and then to assign to her the policy of insurance, if plaintiff would hold up and not sue her on said purchase-money.

Now, although the plaintiff had her own deposition taken in the cause, she states nothing in regard to said alleged agreement between herself and said Ingraham, that she should insure the property and assign to her the policy, if plaintiff would not sue on said deferred note; and no other witness proves any such agreement. If such an agreement had been established, it would have constituted an equitable lien in favor of the plaintiff upon said policy of insurance; but no such agreement having been proven, and it being positively denied by the answer, it need not be considered further. The loss of said house, however, by fire, having occurred subsequent to said agreement of the 31st of January, 1885, in regard to the rescission of said contract of sale, and before the first day of March, 1886, when said agreement was to be consummated, a question presents itself as to whether this state of circumstances would entitle the plaintiff E. D. MacCutcheon to said insurance-money or any part thereof. In *Wood on fire Insurance*, p. 558, § 330, we find, that "a mere contract to sell property covered by insurance, even though the insured has bound himself to convey upon the performance of certain conditions, does not affect the validity of the policy; and if a loss occurs before the conditions are performed, a recovery may be had by the insured, even though the conditions are subsequently performed; and, if it was agreed, that the policy should be assigned to the purchaser, the judgment will inure to his benefit. Neither will a conditional transfer of property avoid the policy, but, if the insured parts with all his interest in the property, the policy ceases to be operative." See, also, 2 Bart. Ch.; Pr. p. 918, § 290; also *Insurance Co. v. Morrison*, 11 Leigh, 354.

In *Fland. Ins.* p. 458, § 11, we find that a conveyance, and simultaneous reconveyance back, or a transaction which amounts only to a conditional sale, is not such alienation as avoids a policy of insurance." * * * * "A contract of sale, the vendor retaining the title as his security for the unpaid purchase money, does not divest his insurable interest. The vendor, before payment of the purchase-money and delivery of the conveyance, is to all intents and purposes the

owner of the estate." In *Gilbert v. Insurance Co.*, 23 Wend. 43, the insured premises were conveyed in fee, and a mortgage taken back to secure a portion of the purchase-money. The residue of the purchase-money was left open to await the result of a controversy between the vendor and a third person respecting incumbrances on the property, the deed and mortgage although recorded to remain in the hands of a third party, until such controversy was settled. Meanwhile the premises were destroyed by fire, and it was held, that the deed did not take effect as an operative instrument until the happening of the contingency provided for, and that the fact of its having been recorded was only *prima facie* evidence of a delivery, and might consequently be rebutted, and therefore the grantor was divested of his insurable interest in the premises. See, also, *Fland. Ins.* p. 426, § 7. and *Trumbull v. Insurance Co.*, 12 Ohio, 305.

Considering, then, the facts and circumstances developed in this case in the light of these authorities I am of opinion, that the plaintiff, MacCutcheon, has no lien of any description upon said insurance-money, but that the said defendant, Rachel C. Ingraham, had an insurable interest in said real estate, both at the time said property was insured, and at the time said loss occurred, and that she was entitled to said insurance-money as between herself and the plaintiff. I am further of the opinion, that the Circuit Court erred in its decree of June 29, 1887, in decreeing in favor of the plaintiff on the single bills described in the deed from plaintiff to said Ingraham for the sum of \$480.86 or any other sum and in decreeing a sale of said lots to satisfy the lien retained on the face of said deed. This being the case, it is unnecessary to express any opinion upon the regularity of the proceedings had upon the attachment sued out in the cause, as it was only auxiliary to the original suit, and all dependent proceedings must fail, if the original suit is not sustained.

The decree complained of must be reversed, and the bill dismissed, and the appellee must pay the costs of this appeal and of the court below.

REVERSED. DISMISSED.

CHARLESTON.

LAIDLEY v. SMITH,

*(GREEN, JUDGE, Absent.)

Submitted January 26, 1889.—Decided March 12, 1889.

1. LIMITATIONS OF ACTIONS—RECEIVERS.

On the 16th day of June, 1865, in the chancery cause of *Ruffner and Long v. Donnally and others* pending in the Circuit Court of Kanawha county, a decree was entered directing the receiver to lend out certain money in his hands to the credit of said suit. In pursuance of said order W., the receiver, loaned to S. \$125.00 and took a promissory note therefor payable on demand to W., receiver of the Circuit Court of said county with interest from date, the 5th day of January, 1886, the note showing on its face that it was given for money borrowed from the chancery cause of *R. & L. v. D. et als.* W. died, and L. was appointed general receiver of said court in his stead June 2, 1877. G. S. L., as special receiver, was directed on the 10th of April, 1884, he having been appointed such special receiver, to collect said fund, and in pursuance of said direction he instituted this suit against S. and filed his declaration in the month of November, 1885. The defendant interposed the plea of the statute of limitations, to which the plaintiff objected and replied generally but filed no special replication. *Held*, The claim, upon which said suit was predicated, was barred by the statute of limitations, and if the plaintiff relied upon any of the statutory or other exceptions to take said claim out of the operation of said statute, it should have been set forth in a replication to said plea.

2. Point 1 of syllabus in *State v. Miller*, 26 W. Va. 106, considered and re-affirmed.

Miller & Gallaher for plaintiff in error.

J. M. Laidley and *W. Mollohan* for defendant in error.

ENGLISH, JUDGE.

This was an action of debt brought in the Circuit Court of Kanawha county by Charles C. Lewis, receiver of said Circuit Court, the declaration was filed on

*On account of illness.

32	387
47	807
32	387
57	675
32	387
62	509

the first Monday in November, 1885. The action was founded on a promissory note bearing date on the 5th day of January, 1866, which note is in the words and figures following:

"\$125.00. On demand, we, or either of us, promise and bind ourselves to pay Levi J. Woodyard, receiver of the Circuit Court of Kanawha county, one hundred and twenty-five dollars borrowed money from the chancery cause of Ruffner & Long v. Donally and *als.*, with interest from date until paid. Witness our hands this 5th day of January, in the year 1866.

[Signed]

"ISAAC N. SMITH,

"BENJAMIN H. SMITH.

"Credit May 23, 1868, paid by B. H. Smith, fifty dollars."

On the 22d day of January, 1886, the defendant demurred to the plaintiff's declaration, and plaintiff joined; and the court having considered said demurrer overruled the same, and thereupon the defendant pleaded *nil debet* and payment and tendered a special plea in writing, to wit, the statute of limitations, to which the plaintiff objected, and the court took time to consider thereof, and on the 11th day of July, 1888, the defendant B. H. Smith having departed this life, and Charles C. Lewis having been appointed the executor of his last will and testament and having qualified as such, and George S. Laidley having been appointed as special receiver in the case of *Ruffner and Long v. Donnally et als.*, in the place of said Charles C. Lewis, general receiver, to prosecute the suit at bar and to collect the fund in litigation in this cause, the suit was revived in the name of said George S. Laidley as such special receiver therein, and by consent the same was revived against said Charles C. Lewis as executor of said B. H. Smith, deceased, as defendant therein, and the objection to the plea of the statute of limitations tendered by B. H. Smith in his lifetime having been argued and considered by the court was overruled, and said plea was ordered to be filed, and the plaintiff replied generally thereto, and the action was submitted to the court in lieu of a jury; and the court, having heard the evidence and arguments of counsel found the issues therein for the plaintiff and gave judgment for the plaintiff for the sum of \$205.01 with inter-

est thereon from the 11th day of July, 1888, and costs, to which ruling and judgment of the court the defendant tendered a bill of exceptions, which was signed, sealed and saved to him, which bill of exceptions shows, that upon the trial of said action the plaintiff to support the issue on his part gave in evidence said note, executed as aforesaid by B. H. and I. N. Smith, also a decree of the Circuit Court of Kanawha county dated June 16, 1865, made in the case of *Ruffner and Long v. Donally and others*, directing the receiver to lend out said money on good security, also the order entered in said chancery cause on the 10th of April, 1884, directing C. C. Lewis, general receiver, to collect all the money due to the credit of said suit and, if necessary, to institute legal proceedings for that purpose, also an order of said court made June 2, 1877, appointing Charles C. Lewis general receiver in lieu of Levi J. Woodyard, deceased, showing his qualification, and also directing the executor of said Woodyard to turn over all moneys, bonds, and securities in his hands, both as general and special receiver, to the new receiver, and directing said new receiver to do and perform such duties with regard to the funds and securities which may come into his hands as the said Woodyard was required by any decree or order of the court to do and perform, or such as he was required by law to do and perform; also another decree in said chancery suit of *Ruffner and Long v. Donally et als.*, appointing G. S. Laidley special receiver and directing him to collect said funds and pay over the same to the parties entitled thereto,—which was all the evidence heard upon the trial of the cause for either party.

The note, on which this suit was predicated, bears date on the 5th day of January, 1866, and the declaration seems to have been filed on the first Monday in November, 1885. The writ is not made part of the record, but it is presumed, it bore date more than ninety days before the filing of the declaration. The suit then was instituted nearly twenty years after the note was executed. The plea of the statute of limitations was interposed; and one of the questions, perhaps the most important question, in the case is, whether said plea should have been sustained by the court. Under the statute, which was in force at the time of the execution o

said note, every action to recover money, which was founded on any contract in writing signed by the party to be charged thereby or by his agent, but not under seal, should be brought within five years next after the right to bring the same shall have first accrued. When did the right of action accrue in this case? The note was made payable "on demand," and it is contended, that the words "on demand" are not employed as a matter of course or idle form, but they were employed to carry out the order of the court as to the disposition of the fund, the money being money in the hands of the receiver, which he was directed to loan out; and it appears from the decree directing said loan, that the receiver was directed to loan out said money on good security to be subject to the order of the court. This would make the loan a loan on call, if the parties executing said note had full notice of said order, which the court would presume they had. The contract for said loan was made with the receiver, who was merely the agent of the court and acting for the court in lending the money.

When did the court have a right to institute suit upon said note? After it had been executed and delivered to the receiver, it was under the control of the court in the hands of its agent. Parsons in his work on Mercantile Law discussing the question, when the statute of limitations begins to run, says on page 248: "And the general rule is, that it begins when the action might have been commenced, "referring to *Odlin v. Greenleaf*, 3 N. H. 270, where it is held: "An action of *assumpsit* is barred by the statute of limitations only in cases where the time limited in the statute has elapsed after the right of action accrued." Parsons further says: "If a credit is given, this period does not begin until the credit has expired; if a note on time be given, not until the time has expired, including the additional three days of grace; if a bill of exchange be given payable at sight, then the six years begin after presentment and demand; but if a note be payable on demand, or money is payable on demand, then the limitation begins at once." See *Stafford v. Richardson*, 15 Wend. 302; *Hickok v. Hickok*, 13 Barb. 632.

This note being payable on demand, it was optional with

the court when it through its agent, the receiver, should institute suit to collect the same. If the court was excusable in allowing so much time to elapse between the date of the execution of said note and the decree directing the collection of the same by the receiver, it would seem to us, that under the practice, when the plea of the statute of limitations was interposed, and the plea was objected to by the plaintiff, in addition to said objection he should have filed a special replication setting forth the facts relied on to excuse the delay and avoid the effect of said plea. See Ang. Lim. § 292, p. 315. But no such replication was filed, and none of the exceptions contained in the statute were relied upon by any such pleading to show, that said plea did not apply or was qualified in any manner. It is however contended here in argument, that the statute of limitations can not be pleaded against the court; that in this respect the court is like the state, and the old maxim, *nullum tempus occurrit regi*, applies. Our statute, Warth's Code, § 20, p. 262 however provides, that "every statute of limitation, unless otherwise expressly provided, shall apply to the state." The courts came into existence by virtue of the constitution and the laws, which confer and define their powers, and in the same category is found a municipal corporation or a county. They derive their powers under the law.

This Court held in the case of *City of Wheeling v. Campbell*, 12 W. Va. 53, that the statute of limitations runs against a county or other municipal corporation. See, also, *Asylum v. Miller*, 29 W. Va. 327, (1 S. E. Rep. 740), in which it is held (page 329), that "public corporations, whether they are municipal or mere agencies of the state, are all more or less branches of the government and necessarily clothed with attributes and incidents of sovereignty; yet, when they are clothed with the capacity to sue and be sued to have a common seal to take and hold property and transact business, they are governed by the same laws, rules and regulations and subject to the same limitations, that natural persons are, except so far as they may be exempted or relieved by positive law." Ang. Lim. § 194, p. 202. Chief Justice MARSHALL, in 2 Wheat. 29, in the case of *McIver v. Ragan*, speak-

ing of the application of the statute of limitations says: "Wherever the situation of a party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception. It would be going far for this court to add to those exceptions. It is admitted that the case of the plaintiffs is not within them, but it is contended to be within the same equity with those which have been taken out of the statute; as where the courts of the country are closed so that no suits can be instituted."

Our statute excepts neither courts nor their agent, the receiver, from the operation of said statute, and, although it seems necessary, that a receiver should apply to the court for power to collect sums invested by him as such, yet it is really the court bringing the suit through its agent, the receiver; and, if the receiver or those interested in the fund so loaned or invested by him have slept upon their rights unreasonably and have neglected to make application to the court for leave to sue for such a length of time, that the demand may be fairly regarded as stale, it would seem to furnish ample ground for a refusal by the court of the necessary leave to use its process to enforce the claim.

I am therefore of opinion, that, as the receiver, to whom this note was made payable, or those interested in the chancery cause of *Ruffner and Long v. Donally et. als.* might have obtained leave of the court to bring suit upon said note by mere motion at any time, in failing to do so they fall into the same category as any other suitor, who neglects to invoke the aid of the court in the assertion and prosecution of his claims, and that said suit was delayed too long, and the claim, upon which it was predicated, was barred, at the time said suit was instituted.

It is contended in argument that unless motion is made for a new trial, and, when said motion is overruled, a bill of exceptions is taken setting out the facts, no appeal can be granted. In the case however of *State v. Miller*, 26 W. Va. 106, this Court held: "While it is the usual practice, where a jury is waived and the case submitted to the court in lieu of a jury, if the party, against whom the judgment is rendered, is dissatisfied therewith, to except to the judgment and have

the court certify the facts proved, yet it is not necessary for the record to show, that the judgment was excepted to; it is sufficient, if the fact appear upon the record either by the certificate of the court or otherwise." Under this ruling then, where the case is tried by the court, it is not necessary to move to set aside the finding of the court, and upon said motion being overruled to take a bill of exceptions setting forth the facts proved; it is sufficient, as in this case, if the facts in evidence appear upon the record by the certificate of the court or otherwise.

The judgment of the Circuit Court must be reversed; and, this Court proceeding to enter such judgment as the court below should have entered, it is ordered, that the plaintiff's action be dismissed.

DISMISSED.

CHARLESTON.

GOFF v. WILSON.

*(GREEN, JUDGE, absent.)

Submitted March 9, 1889.—Decided March 12, 1889.

ELECTIONS—GOVERNOR—MANDAMUS.

When neither the speaker of the house of delegates nor the joint assembly of both houses of the legislature convened under section 3 of article VII of the constitution of this state for the purpose of opening and publishing the returns of the election for the office of governor does in fact open and publish the returns in respect to said office or declare any person elected to that office, this Court can not by *mandamus* adjudge the person, who appears from the returns certified to the speaker of the house to have received the highest number of votes for that office, to be the governor and compel the person, who was the governor during the preceding term to deliver the office and its insignia to him.

W. P. Hubbard, J. A. Hutchinson and A. Burlew for petitioner.

*On account of illness.

22	366
37	270
32	383
48	383
32	383
49	17
32	393
57	30
57	31
57	610

J. W. St. Clair, E. W. Wilson in pro per. and Attorney-General Alfred Caldwell for respondent.

SNYDER, PRESIDENT:

On March 7, 1889, Nathan Goff presented his petition to this Court, then in session, in which the petitioner avers in substance as follows: that at the general election held in this State on November 6, 1888, he was voted for and elected by the qualified voters to the office of Governor of the state for the term commencing on March 4, 1889; that the commissioners of the respective county courts ascertained the result of said election in their several counties in respect to the office of governor in the manner prescribed by law and made out and signed certificates, which they transmitted in due form of law to the Secretary of State, in sealed envelopes directed to the speaker of the house of delegates; that the Secretary of State delivered said certificates to the speaker of the house as required by law; that said certificates contained the result of said election for the auditor and other executive officers as well as for governor, and all of said county certificates were inclosed in one envelope; that the speaker of the house in the presence of a majority of each house assembled in the house of delegates for that purpose opened the envelopes containing all the said certificates and returns, and as to the aforesaid officers, other than governor, published the same, and as to the office of governor the said certificates and returns, after they had been opened as aforesaid, were delivered to a committee of the legislature appointed under the statute relating to contests for governor to report upon the same; that the said certificates and returns with respect to the office of governor showed, that for said office petitioner received at said election 78,714 votes, A. B. Fleming received 78,604 votes, and all other persons together received for said office less than 5,000 votes, thereby showing that petitioner had received a plurality of all the votes cast for said office at said election; that said A. B. Fleming had caused a notice of contest for the office of governor to be given to petitioner, and he in turn had a counter-notice given to said Fleming, both of which notices had been served and were on January 17, 1889, presented to the legislature and printed at large

upon the journal of the house of delegates, which notices as well as the journals of the senate and house of delegates, so far as the same show the action had with respect to ascertaining the result of said election and in the matter of said contest for the office of governor, are made parts of the petition; that on March 4, 1889, petitioner took the oath of office of governor in the manner prescribed by law, and on the afternoon of that day he went to the governor's office in the state capitol, where he found E. W. Wilson, who had been elected governor at the election held in 1884, and had held said office for four years ending on said 4th day of March, 1889, and still had in his possession the property and insignia of said office, and demanded of him the possession of said office and the property and insignia of, belonging, and pertaining thereto, but the said Wilson refused to surrender and deliver such possession to petitioner, and held and still holds and detains the said office, property, and insignia against the right and demand of petitioner and declares, that he will continue to do so.

Petitioner insists that he was elected to the office of governor; that neither the speaker of the house, the two houses of the Legislature, nor either of them, did or would declare him elected, but wholly failed and refused to do so, or to declare any one elected to said office; and that such failure to make such declaration can not affect his right to said office. Petitioner therefore prays for the writ of *mandamus* against said E. W. Wilson, to require him to show cause why he should not be compelled to surrender to petitioner said office, and all the property and insignia belonging thereto *etc.*

Upon the presentation of said petition the defendant, E. W. Wilson, appeared in court, and waived process, and demurred to and moved to quash said petition, which it was agreed by the parties should be treated as an alternative writ; and it was further agreed that the case should be heard upon said petition, demurrer, and motion to quash without further pleadings, and determined upon its merits, without regard to merely technical objections or questions. The case was afterwards fully argued and submitted to the court.

It appears from the journal of the house of delegates, which is made a part of the aforesaid petition, that the

following resolutions were adopted by the joint vote of the two houses of the legislature assembled in the house of delegates for the purpose of complying with section 3 of article VII of the constitution of this state, relative to the turns of the election for state officers, held November 6, 1888 :

“Whereas, it appears that there is a contest as to the result of the election for governor of the state, as set forth in the petition and notice of the Hon. A. B. Fleming against the Hon. Nathan Goff, presented before this joint assembly this day, therefore be it resolved, that the publishing and declaration of the result of the vote for the said office of governor be suspended until said contest be decided in the manner prescribed by law. Resolved, that it is hereby declared as the opinion and decision of this joint assembly, that the mere reading of the returns of the election for governor, already opened, shall not be construed to give either the Hon. N. Goff or the Hon. A. B. Fleming any claim or right to the office of governor, and that all of the returns of the said election shall be referred without reading any of the returns not yet opened to the joint committee provided by the law, relating to contests for the office of governor, and be hereafter considered and have the effect as if none of the said returns had been read.”

It further appears, that a joint committee of the two houses was appointed to examine and report upon the contest between Fleming and Goff for the office of governor, and all the returns and papers relating thereto were referred to said committee. It further appears upon said journal that on January 4, 1889, an order was made by the Circuit Court of Kanawha county superseding the certificate of the commissioners of the County Court of Kanawha county ascertaining the result of the election for the office of governor, held on November 6, 1888, in said county. Other facts appearing upon said journal may be hereinafter referred to, so far as they may be found material to the matters under consideration.

It is conceded, and it is unquestionably true, that, that if the petitioner is entitled to the office of governor, he may obtain it by *mandamus*. *Dew v. Judges*, 3 Hen. & M. 1; *Conlin v. Aldrich*, 98 Mass. 557; *Harwood v. Marshall*, 9 Md.

83; *Bridges v. Shallcross*, 6 W. Va. 562. The second and third sections of article VII of our constitution are as follows:

“(2) An election for governor, state superintendent of free schools, auditor, treasurer, and attorney-general shall be held at such times and places as may be prescribed in this constitution or by general law. (3) The returns of every election for the above-named officers shall be sealed up and transmitted by the returning officers to the secretary of state, directed ‘to the speaker of the house of delegates,’ who shall, immediately after the organization of the house, and before proceeding to business, open and publish the same, in the presence of a majority of each house of the legislature, which shall for that purpose assemble in the hall of the house of delegates. The person having the highest number of votes for either of said offices shall be declared duly elected thereto; but, if two or more have an equal number, and the highest number of votes for the same office, the legislature shall, by joint vote, choose one of such persons for said office. Contested elections for the office of governor shall be determined by both houses of the legislature by joint vote, in such manner as may be prescribed by law.”

The first section of the same article provides, that the terms of said officers “shall be four years and shall commence on the 4th day of March next after their election,” and by section 7 of article IV of the same constitution it was provided that “the general elections of state and county officers and of members of the legislature shall be held on the second Tuesday of October until otherwise provided by law.” The time fixed for the commencement of the sessions of the legislature is the second Wednesday of January every two years.

Under the aforesaid provision of the constitution in respect to contesting the election for the office of governor the legislature at its session in 1873 passed an act providing that, if the election of governor, treasurer, auditor *etc.* be contested, the contestant must give notice to the person whose election is contested within sixty days thereafter, and within thirty days thereafter the party, whose election is contested, shall in like manner give notice to the contestant. The par-

ties shall finish taking depositions within forty days, after the last-mentioned notice is delivered.

In case the contest is for the office of governor, the petition of the contestant and the depositions shall be referred to a joint committee of the two houses for examination and report. The contest shall be determined by the legislature, both houses thereof sitting in joint session in the hall of the house of delegates, the speaker of which house shall preside. Sections 63, 64, c. 118, Acts 1872-73. It will thus be observed that it required at least 110 days from the date of the election to mature the contest for trial, which would still leave ample time for the trial and determination of the contest before March 4th, the time at which the governor goes into office. But by amendment of said section 7 of article IV of the constitution adopted in 1880 the time of holding the general election for governor and other state officers was changed from the second Tuesday in October to the next Tuesday after the first Monday in November, thus leaving an insufficient time intervening between the date of the election and the 4th of March to mature and determine the contest for the office of governor. Since this change in the constitution no alteration has been made by the legislature in respect to the time for maturing the trial of a contest for the office of governor, although in 1882 some slight modifications were made in the statute on that subject in other respects. Chapter 6, Code.

In this condition of the law the legislature, when it assembled in January last and found, that there was a contest pending between Gen. Goff and Judge Fleming for the office of governor, was confronted with this very grave and serious question: Was it their duty to declare either of the claimants elected to the office of governor, until after the contest could be decided? If they or the speaker of the house should at the commencement of the session, or during the term fixed by law for its continuance in regular session, declare either Goff or Fleming governor, the inevitable consequence would be, that the person so declared would have to assume the duties of the office, before it would be possible to try the contest or determine his right to the office under the existing law. The result of this might be to place in the

high and responsible office of governor and at the head of the state government a person, who had never been elected or otherwise designated by either the constitution or the law to discharge the duties of that office; for, if the trial of the contest should result in favor of the other claimant, his title would relate to the date of his election, and he would be the *de jure* governor from the commencement of the term fixed by the constitution. The decision upon the contest would be simply the determination of a fact. It would not create a fact or a right nor confer the office. The election gives the right to the office, and the decision of the tribunal fixed by law to try the contest simply declares the title upon the evidence but does not create or confer it; and if a person has the title by virtue of his election, his qualification entitles him to exercise the duties of the office. *Bier v. Gorrell*, 30 W. Va. 95, 100, (3 S. E. Rep. 30.) This being so, it is plain, that the person thus placed in the office before the decision of the contest would be there without any legal right. He would be a mere intruder, because he had never been elected, and was never legally entitled to the office.

It is not overlooked, that under some constitutions and systems of government it may occur and is contemplated, that a person may during a contest exercise the functions of an office, to which he has not been elected, and which he had no legal right to hold. This is conspicuously so in the cases of members of the legislature and the lower house of congress. In these cases such a result is unavoidable, because the very body, in which such person sits, is the tribunal appointed to determine the contest. But such is not the case in respect to the governor and other executive officers of this state. Our constitution provides, that the terms of all officers except the executive officers shall commence on January 1st, but, in order that the governor and other executive officers may not be called upon to exercise the duties of their respective offices, until any contest in respect thereto may be determined, the constitution wisely postpones the commencement of their terms until March 4th. It may also be conceded, that by the provision of the constitution before quoted, which provides for the opening, publishing and declaring the result of the election, it was intended, that this

declaration of the result should precede the contest, and thus give to the person having the highest number of votes, as shown by the certificates and returns, the *prima facie* title to the office and the right to the advantageous position of contestee in the subsequent contest.

But, while this may have been contemplated by the framers of the constitution, it is just as plain, that they also contemplated, that the legislature would, as it was clearly its duty to do, provide by law for the maturity and trial of a contest for any and all of said offices before the time fixed for the commencement of the term. It is scarcely possible to believe, that it was contemplated by those, who made and adopted our constitution, that we should ever have the anomaly of a person discharging the high and responsible duties of the chief executive office of the state, who had never been elected or otherwise designated by law to perform the duties of that office. The careful and guarded provisions of the constitution itself as well as its general policy forbid any such construction, unless there is no escape from it.

The joint assembly of the two houses finding itself in this serious dilemma produced not by any question as to the intent and purpose of the organic law but by a defective statute or the omission of the legislature,—whether resulting from inadvertence or other cause it is immaterial to inquire, —to provide in a proper and practicable manner and in accordance with the express power conferred upon it by the constitution for the trial and determination of a contested election for the office of governor before the commencement of the term of office, decided, as, we must assume, it believed, it had the right to do, to refer the certificates and returns for said office to a joint committee on the contest appointed in the manner prescribed by law, and to suspend the publishing and declaration of the results, until said contest should be decided. This decision and action of the joint assembly, to say the least of it, do not appear to be either unreasonable or unjust to any one under the peculiar and embarrassing circumstances of the situation before them.

But for the purposes of the case now before us it is unnecessary for us to determine, whether this action of the joint assembly was right or wrong. The real question for us

to decide are: (1) Did that assembly or any constituent part of the legislature have jurisdiction of the subject? that is, Did it have the constitutional right to determine the question? (2) If so, had it any discretion as to how it should determine the question, or the manner in which or the time, within which, it should finally decide? If these two inquiries are solved in the affirmative, then, so far as this proceeding by *mandamus* is concerned, it had the same legal power to decide wrong, that it had to decide right; for it is a principle of law too well settled to justify the citation of precedent, that, while *mandamus* may be invoked to compel the decision of a discretionary question, it cannot be used to dictate or control that decision, even when directed to the officer or tribunal having the power to determine the question; much less will a court in a collateral proceeding, such as the one before us, undertake to review or correct such decision, however erroneous it may be, or however unjust and unreasonable.

1. That either the Speaker of the House or the joint assembly (and for present purposes it is immaterial which) has jurisdiction to open and publish the returns of the election and declare the result, there can be no denial; for the right to do so is conferred by the constitution in express terms. The language employed is: "The speaker of the house of delegates shall * * * open and publish the returns in the presence" *etc.* "The person having the highest number of votes * * * shall be declared duly elected."

2. The important inquiry is, whether or not this authority, by which is given the right to open and publish the returns and declare the result, is in any way a discretionary power; that is, whether or not the power conferred is merely mechanical or purely ministerial involving no act, in which there is any legal right to exercise discretion, or make any choice as to the conclusion, which must be reached. It is hardly possible to conceive of a public office, the duties of which do not require of the officer filling it the exercise of discretion. In some instances judicial officers perform ministerial acts, and on the other hand purely ministerial officers exercise discretionary or *quasi* judicial functions. Almost every public officer, whether judicial or ministerial, must in

the discharge of his duties act in both capacities. Some of his acts will necessarily be ministerial, while others from the same necessity must be judicial or discretionary.

When a ministerial officer exercises discretionary powers, such acts are generally denominated "*quasi* judicial acts." In *Henderson v. Smith*, 26 W. Va. 829, this Court decided that a notary public in taking and certifying the acknowledgement and privy examination of a married woman to a deed acted in a *quasi* judicial capacity. And in *Brazie v. Commissioners*, 25 W. Va. 213, we decided that the county commissioners of a County Court, when assembled in special session to ascertain the result of an election, exercised *quasi* judicial functions in determining, that the ballots, poll-books and certificates of the election returns laid before them are genuine; that they are in fact the returns, and substantially in the form prescribed by the statute. It is true, we held in that case, that prohibition would lie to prohibit the commissioners from usurping and attempting to exercise judicial functions not conferred upon them by law, but the opinion clearly shows, that the court could not interfere either by prohibition or, its correlative writ, *mandamus* with the judicial discretion of the commissioners in respect to any of the discretionary powers conferred upon them by the statute.

If the county commissioners, which is conceded to be a ministerial body, can, when sitting as a canvassing board to ascertain the result of an election, exercise discretion in determining the genuineness of the certificates of the returns laid before them, it seems to me to be equally reasonable and proper, that the joint assembly of the two houses of the Legislature, when the certificates of the returns of an election for governor or other executive officer are opened and published by it or by the speaker in its presence, should determine whether or not those certificates are genuine, and in fact the legal returns or certificates of the election. If it is the right and duty of that body to do so, then of necessity that right involves the exercise of a discretion and choice of decision. It involves the power to decide wrong as fully as it does to decide right, and in neither case can its decision be controlled or reviewed by *mandamus*.

The house journal, which is made a part of the petition in

this case, shows, that in the returns from Wood county there was a defective certificate of the vote for auditor, and in the returns from Webster county there was no certificate as to the vote for attorney-general. If the returns had been published without supplying these omissions, the result would have been different from that which it was ultimately declared to be. It does not seem, that the right of the joint assembly to supply this omission by supplementing the returns laid before it, was or could be with propriety questioned by any one.

In respect to the returns for the office of governor, the said journal shows, that the certificate for the county of Kanawha had been superseded by an order of the Circuit Court of that county upon a writ of *certiorari* to set aside said certificate and return, and that said order was still in force. It can not be denied, that said court had jurisdiction to make said order and in a proper case to set aside or correct said certificate; for this Court has expressly decided, that it had such jurisdiction. *Chenoweth v. Commissioners*, 26 W. Va. 230; *Alderson v. Commissioners*, 31 W. Va. —, (8 S. E. Rep. 274.) What was the defect in this certificate, or what returns it purported to give, we have no means of determining, but in the absence of anything showing the contrary, even if this Court could inquire into any question in respect to said returns, which is not conceded, it would be mere assumption to hold, that the joint assembly had not the legal right to question or reject at least that certificate; and, if that had been done, enough appears upon said journal to make it probable, that Fleming and not Goff would have had a majority of the votes cast in the State and would therefore probably have been declared elected governor.

It seems to me therefore, that the joint assembly sitting for the purpose of opening and publishing or seeing opened and hearing published the returns of the election for governor and other executive officers acted in a *quasi* judicial capacity, at least in respect to determining the genuineness of the certificates, and that it was not bound to publish the returns or declare the result, until it had before it all the genuine returns or had exhausted all the means in its power to obtain them without success, and the Legislature having a *quasi*

judicial or discretionary authority in respect to these matters and not having finally refused to exercise that authority, this Court can not by *mandamus*, if it could do so in any proceeding, take jurisdiction either for the purpose of determining those matters for itself, or of determining the result of the election.

It is however insisted, that the demurrer to the petition admits, that the petitioner had received the highest number of votes for the office of governor, and that therefore nothing was left undone or could have been done, by the joint assembly to entitle him to the office, except the purely ministerial act of declaring him elected; and, inasmuch as that must be the inevitable result of what had been done or what is admitted by the demurrer here, this Court will treat that ministerial act as having been done, and adjudge the office to the petitioner.

I do not think, the admission goes to the extent claimed. The petition simply avers, that the certificates and returns made out by the county commissioners, so opened and published, in fact showed, that the petitioner had the highest number of votes for the office of governor. Now as a matter of fact other parts of the petition and the journal of the house, which is made part of it, show, that only a part of the certificates for governor had been opened, and that none of them had been approved as correct or published. We must take all the allegations of the petition together, and when we do so, we find, that it is impossible, that the certificates and returns "so opened and published in fact showed that petitioner had received 78,714 votes." I think, therefore, there is no foundation for this contention.

I have thus far considered the important questions presented without reference to the fundamental principles lying at the basis of our republican system of government, and which were so learnedly and ably discussed by counsel. According to these principles the case must also be determined against the claim of the petitioner. Our constitution declares: "The legislative, executive, and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of

them at the same time, except that justices of the peace shall be eligible to the legislature." Article V. Other portions of the constitution, as we have seen, not only provide, that the legislative department of the government shall open and publish the returns of the election for governor and declare the result, but confer upon that department the exclusive right to try and determine contested elections for that office.

It was admitted in the argument in this case, that the legislature must first act upon the returns of the election for governor, or at least that body or some constituent part of it is the only authority, by which the returns can be opened and published; but it is denied by the counsel for the petitioner, that, if that body refuses to declare the result of the election, such refusal will prevent the person having the highest number of votes from qualifying and exercising the duties of the office; and as a corollary of this proposition they insist, that the judiciary department has the power, in case the legislative department fails to discharge its whole duty by declaring the result of the election, to declare that result or, what is the same in effect, to adjudge the person receiving the highest number of votes for the office of governor to be in fact the governor.

It is claimed, that this right or power in the court is the result of absolute necessity; for otherwise the sacred rights of the people are at the mercy of the legislature, however corrupt or partisan may be its actions. This was a proper matter for the consideration of the framers of the constitution and of the people, when they adopted it, but when the people in their sovereign capacity declared in their constitution, that this power should be vested in the legislative department of the government, and that the judiciary should not exercise any of the powers belonging to that department, the question was settled, and the courts have no power to interfere or question its wisdom. For the grounds and reasons why the courts can not and will not undertake to determine questions such as the one here presented, I refer to the exhaustive discussion of the subject in the following decisions: *State v. Baxter*, 28 Ark. 129; *Baxter v. Brooks*, 29 Ark. 173; *Grier v. Shackelford*, 2 Treadw. (S. C.) 642; *Batman v. Megowan*, 1 Metc. (Ky.) 533; *State v. Marlow*, 15

Ohio St. 114; *Royce v. Goodwin*, 22 Mich. 496; *State v. Mason*, 77 Mo. 189; *State v. Lewis*, 51 Conn. 113; *State v. Harmon*, 31 Ohio St. 250; *Collin v. Knoblock*, 25 La. Ann. 263; *Rogers v. Johns*, 42 Tex. 339; *People v. Supervisors*, 100 Ill. 495; *Attorney General v. Barstow*, 4 Wis. 567; *Ex parte Smith*, 8 S. C. 495; *People v. North*, 72 N. Y. 124; *People v. Crissey*, 91 N. Y. 616.

I could add nothing either in argument or conclusiveness to the views expressed in the foregoing cases, and I shall therefore simply say, that according to the principles decided in those cases the declaration of the result of the election for governor under the provisions of our constitution is essential to the right to exercise the duties of that office; and, as the constitution has conferred the power to make this declaration upon the legislative department, that power is exclusive, and beyond the control or interference of the courts in any manner. To dispense with this declaration would be to nullify an express requirement of the constitution. This we are not at liberty to do. This declaration is the only record provided by the constitution to show, who is entitled to the office of governor. It is the only commission provided for him and is the only constitutional evidence of his title to the office.

For the reasons hereinbefore given I am of the opinion, that the peremptory writ of *mandamus* should be denied, and the petition dismissed.

DISMISSED.

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CHARLESTON.

BURTON v. GIBSON.

*(GREEN, JUDGE, absent.)

Submitted January 24, 1889.—Decided March 12, 1889.

1. FRAUDULENT CONVEYANCES—WIFE'S EQUITY.

G, who was a merchant in the town of Sissonville, Kanawha

*On account of illness.

county, W. Va., became the owner of a lot in said town containing three fourths of an acre by a deed made to him by M. and wife on the 17th day of August, 1871. When he acquired said lot, his wife, M. G., was the owner of a lot in the same town, which had been conveyed to her by M. and wife by deed dated November 19, 1866, which was recorded on the 3d day of June, 1867. On the 19th of June, 1877, G. agreed with O. to exchange both of said lots in the town of Sissonville for 390 acres of land owned by O. on Blue creek in said county, which agreement was carried into effect on the 23d day of September, 1877, by G. and his wife, M. G., interchanging deeds with O.; said G. and wife conveying to O. said two lots in Sissonville, and O. conveying to said M. G., the wife of G., the said tract of 390 acres. At the time of this exchange said G. had become involved in debt, and in February, 1879, a bill was filed by his creditors praying among other things that the conveyance made by O. to the said wife of G. might be set aside as fraudulent, and said 390 acres of land might be subjected to sale to pay the creditors of G. represented in said bill.

HELD:

While, under the circumstances it might be proper to decree a sale of said 390 acres of land to satisfy the claims asserted in the bill, yet M. G., wife of G. was entitled to a return of the amount she contributed towards paying for said 390 acres to be measured by the value of said lot in Sissonville owned by her, and that before a sale of said 390 acres was made, the court should have directed a commissioner to ascertain the value of said lot in the town of Sissonville, which was in the name of the wife of G. on the 23d day of September, 1877, when it was conveyed to O., in order that her rights might be respected in the distribution; and in order to do that, the value of said lot in the town of Sissonville, held at that date by G., should also have been ascertained; that is, the said M. G. and the said G.'s creditors are entitled to share in the proceeds of the Blue Creek property in the proportion of the value of the respective Sissonville properties contributed by M. G. and M. respectively to the purchase of said property.

E. W. Wilson for appellants.

W. Mollahan and Brown & Jackson for appellees.

ENGLISH, JUDGE:

This was a suit in equity, instituted by Gideon Burton and others against John A. Gibson and others in the Circuit Court of Kanawha county in February, 1879, the object being to set aside certain conveyances made to Mary L. Gibson of lands situated in the said county, as fraudulent and void

as to the plaintiffs and other creditors of said John A. Gibson, and to subject the same to sale to satisfy certain judgments set forth in the plaintiff's bill.

It appears from the pleadings and exhibits filed in said suit, that the defendant Mary S. Gibson, was the owner of a lot or parcel of land in the town of Sissonville in said county containing three fourths of an acre, which was conveyed to her by one Diocletian Martin and wife by deed dated November 19, 1866, which deed was admitted to record on the 3d day of June, 1867; and that her husband, the defendant John A. Gibson, was also the owner of three fourths of an acre of land situated in town of Sissonville, which was conveyed to him by said Diocletian Martin and wife by deed dated August 17, 1871: and that on the 19th day of June, 1877, an agreement in writing was entered into between said John A. Gibson and John O'Reilley and Bernard O'Reilley, whereby said John A. Gibson agreed with the said O'Reilleys, to exchange his Sissonville property for 390 acres of land, more or less, situated on Blue Creek in Kanawha county, owned by said O'Reilleys and some minor children jointly, the said O'Reilleys covenanting with the said Gibson to secure from the court a decree directing a conveyance of the interest of said children in said tract of land; said decree was subsequently obtained, directing Bernard O'Reilley, guardian for said infants, and authorizing and empowering him to convey on behalf of said infants to John A. Gibson by proper deed the interest of said infants in said Blue Creek lands and to deliver said deed to said John A. Gibson upon his (the said John A. Gibson's) making, executing and delivering for record a deed with covenants of general warranty to said John James, Thomas Francis, Elizabeth, Sarah Jane, Peter, Charles, and Joseph O'Reilly for said two store-houses and two dwelling houses with the lots, on which the same are situated; and that in pursuance of said decree Bernard O'Reilley, as guardian for said infants, on the 23d day of September, 1877, conveyed to Mary Gibson, wife of John A. Gibson, said 390 acres of land, and on the same day the said John A. Gibson and Mary L. Gibson, his wife, conveyed to said O'Reilleys three fourths of an acre of land, the same premises which were conveyed to said John A. Gibson by

Diocletian Martin and wife by deed dated August 17, 1871, on which there was situated one dwelling-house and blacksmith shop, also three fourths of an acre, on which was situated a dwelling-house, two store-houses and a stable, which lot was conveyed to Mary Gibson by deed dated November 19, 1866, from Diocletian Martin and wife; that by deed of conveyance bearing date December 14, 1877, Charles C. Lewis conveyed to said Mary L. Gibson a certain lot in the city of Charleston in consideration of the sum of \$1,000.00 which sum seems to have been previously paid by said John A. Gibson, and this lot appears to have been exchanged for 150 acres of land with one John A. Wright, which tract of 150 acres is also located in Kanawha county, and which change was effected by an interchange of deeds made by said John A. Wright and John A. Gibson and Mary L. Gibson on the 26th day of August, 1868.

The plaintiffs alleged, that at the dates of said conveyances made as aforesaid by the said Charles C. Lewis to said Mary L. Gibson the said John A. Gibson and wife to the said John A. Wright, and by the said John A. Wright to the said Mary Gibson, and at the time of the pretended conveyance made as aforesaid by the said Bernard O'Reilley, guardian, to the said Mary Gibson, or immediately theretofore, the said defendant John A. Gibson was and had been for many years engaged in mercantile business in said county of Kanawha; and that certain judgments, which are described in plaintiff's bill, and the accounts and claims, upon which said judgments were recovered against the said defendant John A. Gibson, were all contracted and made by him before the date of said last-mentioned conveyance; and that the said debts were contracted by the said defendant, John A. Gibson, upon the faith and credit of the said real estate then owned by him; that said claims are due and unpaid, and that the said defendant John A. Gibson now holds in his own name no property, from which the same may be paid and satisfied; that the said real estate conveyed to the defendant Mary L. Gibson, viz., said lot in the city of Charleston, said tract of 150 acres and the said tract of 390 acres, which latter tract is claimed and held by said defendant, Mary Gibson, under said pretended conveyance from Bernard O'Reilley, a guardian

as aforesaid, was purchased by said defendant John A. Gibson and paid for by him wholly and entirely by and out of his own money and property, and that no part thereof was paid for by or out of the money or property of the said defendant, Mary Gibson; and that the said conveyance and the said pretended conveyance to the said defendant, Mary Gibson, were made to her without any consideration deemed valuable in law moving from her or on her part, but they and each of them were so made to her at the instance of the said defendant John A. Gibson with intent and for the purpose of delaying, hindering and defrauding the plaintiffs and the other creditors of the said John A. Gibson in the collection and enforcement of their claims against him, and for the purpose of shielding the said real estate from subjection to the payment of said debts; that said conveyances made to said Mary L. Gibson are null and void and fraudulent, and the real estate so conveyed is liable to the said claims and judgments, and that plaintiffs are entitled to a decree for the sale of same or so much thereof, as may be necessary to satisfy and pay off said claims, debts and judgments; and they pray, that the said conveyance made by John A. Wright and Bernard O'Reilley, guardian as aforesaid, to said Mary Gibson may be declared fraudulent, null, and void, and that said O'Reilleys be decreed to convey said 390 acres unto the defendant John A. Gibson; and that said tracts of 150 acres and 390 acres respectively may be decreed to be sold in satisfaction and payment of the debts, claims and judgments aforesaid of plaintiffs.

The said Mary L. Gibson filed her separate answer to plaintiffs' bill stating, that she had no personal knowledge of the various judgments claimed in plaintiff's bill to have been recovered against him; admitting that her said husband on the 2d of October, 1873, purchased of C. C. Lewis and J. Brisben Walker the lot situated in Charleston, Kanawha county, W. Va., for the sum of \$1,000.00; that said Lewis acquired the interest of said Walker in said lot and at the instance of her husband on the 14th of December, 1877, conveyed said lot to her, which deed was duly recorded on the 10th day of January, 1878, and that her said husband paid the purchase-money for said lot, before any or either of the

alleged liabilities in said bill mentioned had accrued against him; that she took possession of said lot under said deed and continued therein, until the exchange was made with John A. Wright for the 150 acres of land before mentioned; and at the time of taking possession of said lot neither of said liabilities had accrued. She also admits, that her said husband had been for years the owner of a lot of land in Sissonville in said county, which only contained about one fourth instead of three fourths of an acre, and instead of the buildings alleged as situated thereon there was only a one story frame dwelling-house with three rooms, and a mere skeleton frame blacksmith shop, and that the other buildings mentioned are on a lot of land formerly owned by her, which was conveyed to her on the 19th day of December, 1866, by deed of that date by Diocletian Martin and wife, which contained three fourths of an acre and adjoined the lot owned by her husband, which lot was paid for in full, at the time said deed was made and long before any of the alleged indebtedness in the plaintiffs' bill mentioned, and before her husband became acquainted with the plaintiffs. She exhibits a copy of said deed with her answer, from which it appears, that said deed was admitted to record on the 3d of June, 1867. She also admits, that said two lots in the town of Sissonville were exchanged for the tract of 390 acres on Blue creek in said county, and that said tract was conveyed to her by said O'Reilleys by deed dated September 23, 1877, which was acknowledged July 3d, 1878, and admitted to record July 29, 1878.

The defendant John A. Gibson answered said bill claiming, that he always gave the representatives of plaintiff to understand, that he did not own said real estate; also denying that any of said real estate was purchased directly or indirectly with any of the goods or merchandise or the proceeds of the sale thereof, giving a history of his purchase of the lot from C. C. Lewis in the town of Charleston, which was exchanged with John A. Wright for the tract of 150 acres and claiming that his wife paid part of the purchase-money for said lot with money she had made by keeping hotel, and about \$50.00 was paid in silver by his wife, which amount she had had for years previous; and as she had paid the

principal part of said purchase-money, and had by her industry and saving contributed largely to acquire it, he had the deed made to her, but not for the purpose of hindering or delaying his creditors from collecting their debts. He also denies, that the exchange of the Sissonville property with the O'Reilleys for the tract of 390 acres was made for the purpose of hindering or delaying his creditors from collecting their debts, but says that said exchange was fair and free from fraud or wrong; that said Sissonville property belonged to his wife, and for that reason the deed was made to her; that a lot containing three fourths of an acre in Sissonville was owned by him, but it was worth only about \$300.00 and, although it went in as part of the consideration for said tract of 390 acres, the real substantial consideration was the three fourths of an acre, which belonged to his wife, which had valuable improvements thereon, consisting of a dwelling-house, two store-houses and a stable, in all worth \$3,500.00; and he claims, that plaintiff knew, that said last-named lot belonged to his wife.

On the 4th of December, 1879, said answers were filed, and the plaintiffs replied generally thereto; and H. D. Shrewsbury, one of the commissioners, was directed to take, state and report an account showing—*first*, the amounts and priorities of the claims by judgment or otherwise against the defendant John A. Gibson; *second*, the amounts and character of the consideration for the conveyances made by deed dated September 23, 1877, from Bernard O'Reilley, guardian, and others to Mary Gibson, wife of John A. Gibson, and by the deed dated August 28, 1878, from John A. Wright to Mary A. Gibson and by whom, when and how the same was paid. On the 14th day of June, 1886, said Shrewsbury tendered his report, which was ordered to be filed. By said report he ascertained the amount and priority of the claims by judgment or otherwise against said John A. Gibson, ascertaining the total amount as of June 1, 1886, to be \$2,622.27. He also ascertained, that by an agreement dated June 19, 1877, said John A. Gibson agreed to convey with covenants of general warranty and relinquishment of his wife's dower to James O'Reilley and others certain real estate situated in the town of Sissonville, Kanawha county, in

consideration that the said O'Reilley's would convey to said John A. Gibson said Blue Creek land, and obtain a decree of the court authorizing the conveyance of the interest belonging to the minor children of said Bernard O'Reilley in said land, that said exchange was made, the title of said Blue Creek land being conveyed to said Mary L. Gibson. He also finds the facts in regard to the manner and date of the acquisition of the title to the lot in Charleston from C. C. Lewis and J. Brishen Walker, and the exchange of the same with John A. Wright for the tract of 150 acres of land situated on Elk river; that both these transactions were exchanges of property by the said Gibsons with the said O'Reilley's and with John A. Wright; that the testimony and the presumptions are, that the real estate contained in the deed from John A. Gibson and wife to the O'Reilley's, viz., said Sissonville property, as well as the real estate contained in said deed from John A. Gibson and wife to John A. Wright, viz., said lot of land in Charleston, were originally paid for by John A. Gibson during the coverture of the said Mary L. Gibson; and that a large portion of the purchase-money was paid by the said John A. Gibson while merchandising and subsequent to the contraction by him of the debts therein reported; and that the consideration for both said tracts of 390 and 150 acres was really paid by John A. Gibson; that he bought and paid for the lots, which were exchanged for said tracts of land, and had said tracts conveyed to his wife; and that said deeds were fraudulent as to the creditors of the said John A. Gibson therein reported; and that he procured said deeds to be made to his said wife for the purpose of hindering, delaying and defrauding his said creditors.

This report was excepted to by Mary L. Gibson and John James O'Reilley and Bernard O'Reilley, guardian *etc.*, so far as the same declares the deed of September 23, 1877, from Bernard O'Reilley, guardian, and others to Mary Gibson and the deed from John A. Wright to her fraudulent as to the creditors of John A. Gibson, and as having been procured to be made to said Mary Gibson, his wife, for the purpose of hindering, delaying and defrauding his said creditors and also as to every other statement in said report charging fraud

or a purpose to delay, hinder or defraud the creditors of said John A. Gibson, or vitiate any or either of the contracts or deeds mentioned in complainant's bill *etc.*

Now, as regards the lot in the city of Charleston, which was conveyed to the defendant Mary L. Gibson by Charles C. Lewis, although it appears in evidence, that the original agreement for the purchase of said lot bears date on the 22d day of October, 1873, yet said agreement was made by the defendant John A. Gibson with said Charles C. Lewis and J. Brisben Walker, that he paid \$60.00 cash in hand and executed forty-seven negotiable notes bearing date October 1, 1873, and payable monthly with interest, until the entire \$1,000.00 should be paid. The evidence shows, that these notes were paid by said John A. Gibson at irregular intervals between the years 1874 and 1878. The last payment of about \$50.00 was made January 9, 1878, and the deed was executed to the defendant Mary L. Gibson, by said C. C. Lewis and wife bearing date December 14, 1877, but the deed does not seem to have been admitted to record until January 10, 1878, the day after the last payment was made; and C. C. Lewis states in his deposition, that his recollection is, that it was delivered on that day.

Charles Kendall, a witness examined in the case, says in answer to a question asked him in his deposition, that the goods sold by the plaintiffs Gideon Burton & Co. to said John A. Gibson, upon which said judgement is founded, were composed of several bills, as follows, to wit: May 5, 1877, \$432.08; June 1, 1877, \$78.75; September 13, 1877, \$358.75; and September 19, 1877, \$71.40. It also appears from the deposition of J. M. Payne, that he had in his hands for collection an account in favor of Lehman, Richman & Co., against said John A. Gibson, a part of which was contracted April 12, 1877, viz., \$178.00, and a part October 18, 1877, viz., \$156.40, and protest-fees, \$1.71, paid July 7, 1877, on which claims were some credits, leaving a balance of \$152.13. So, it will be perceived, a large portion of the indebtedness asserted by the plaintiffs in this suit accrued shortly before the conveyance aforesaid was made by said C. C. Lewis and wife to said Mary L. Gibson for said lot in the city of Charleston, which was subsequently in August, 1878, exchanged for said tract

of 150 acres with said J. A. Wright. It also appears that on the 19th day of June, 1877, the agreement for the exchange of the Sissonville property was entered into between said John A. Gibson, John O'Reilley, and Bernard O'Reilley, that the deeds to carry into effect said exchange were dated on the 23d day of September, 1877, although not recorded until July, 1878. In this manner the conveyances for said tracts of 390 acres and 150 acres to said Mary L. Gibson were made about the time of or shortly after the bulk of the plaintiff's claims originated. It also appears, that the transfer of these tracts of land to the said Mary L. Gibson left the defendant John A. Gibson with no other property, out of which said claims could be made. This fact is alleged in the bill and not denied in the answers.

The plaintiffs in their bill however allege, that on the 19th day of June, 1877, and for many years previous thereto the defendant, John A. Gibson, had been the owner in fee of a valuable parcel of real estate situated in the village of Sissonville, Kanawha county, containing three fourths of an acre, upon which a storehouse and other houses were located, which was conveyed on the 17th day of August, 1871, to said John A. Gibson by one Diocletian Martin and wife by deed of that date. Both the defendants, John A. Gibson and Mary L., his wife, deny, that the lot described in the bill as conveyed to John A. Gibson by Diocletian Martin on the 17th day of August, 1871, is the lot, on which the storehouse and dwelling-house and stable were located, but allege, that there was a blacksmith shop and a cottage with three rooms in it on said lot; and they say in their answers, that the lot, on which said storehouse and dwelling are located, was conveyed to said Mary L. Gibson by said Martin and wife in 1866 on the 19th day of November, and exhibit a copy of said deed with their answer. They also claim, that the lot owned by said John A. Gibson was only worth three or four hundred dollars, while the one owned by the defendant Mary L. Gibson was worth at least \$2,000.00; and although the allegations of the bill are thus positively denied in regard to the character of the improvements on the lot in Sissonville owned by said John A. Gibson, the plaintiffs take no proof in regard to the matter; and, although the plaintiffs allege in

their bill, that John A. Gibson owned the lot in Sissonville, which was conveyed to him by said Martin and wife in 1871, the defendant, Mary L. Gibson, exhibits with her answer two separate deeds from said Martin and wife,—one to herself dated in November, 1866, and one to her said husband dated in August, 1871, showing, that she and her husband owned different lots.

The defendant Mary L. Gibson demurred generally to the plaintiffs' bill and her demurrer was overruled. The plaintiffs in their bill have only alleged, that the lot conveyed to John A. Gibson by said Martin and wife in 1871 was exchanged for the tract of 390 acres where it appears, that the defendant Mary L. Gibson joined with her husband in conveying another lot containing three fourths of an acre as part of the consideration, which lot she owned and held a deed for from said Martin and wife since November, 1866,—more than ten years before it was conveyed by her to said O'Reillys in exchange for said tract of 390 acres; and it must be considered, that the commissioner, who stated the account in this cause, in finding that said Sissonville property was originally paid for by John A. Gibson, referred to the Sissonville property mentioned in the plaintiff's bill, viz., the lot conveyed to John A. Gibson by said Martin and wife in 1871, and not to the Sissonville property, which was conveyed to Mary L. Gibson in 1866, and which is not mentioned in plaintiff's bill; and which could not have been subjected by plaintiffs on account of the conveyance to her being voluntary, because more than five years had elapsed since said conveyance was made before the institution of this suit. It is neither alleged nor proven in this cause, that John A. Gibson was indebted to any person in the year 1866, when said deed was made to Mary L. Gibson by said Martin and wife.

The plaintiffs in their bill only allege that the property that was conveyed to the O'Reilleys in exchange for the tract of 390 acres was the lot conveyed by Martin and wife to John A. Gibson in 1871; and their bill is silent as to the other lot conveyed to Mary L. Gibson by Martin and wife in 1866; and, there being neither allegations nor proofs in regard to the ownership of said last-named lot, the statements made by the defendants in their answers, accompanied by the ex-

hibit of certified copies of the deeds, must be taken to be the true and correct statement in regard to the ownership of said property. There is no fraud alleged in the plaintiff's bill in regard to the manner, in which said Mary L. Gibson acquired said lot, and, such being the case, this court will not presume, that she acquired it fraudulently. It is alleged, that the said John A. Gibson purchased and paid for said tract to said O'Reilleys wholly and entirely out of his own money and property, and that no part was paid out of the money or property of the said Mary L. Gibson, and that said conveyances were made to her without any consideration deemed valuable in law moving from her or on her part; but that the tract of 150 acres and the tract of 390 acres were conveyed to her at the instance of said John A. Gibson for the purpose of delaying, hindering and defrauding his creditors, and the commissioner in his report so finds; and, although his report is excepted to by the defendant Mary L. Gibson and the O'Reilleys, yet the court in its final decree rendered on the 17th day of July, 1886, overruled said exception, confirmed said report, and set aside said conveyances to said Mary L. Gibson and decreed against the said John A. Gibson for the amount of the debts found by said commissioner to be due to said respective plaintiffs, and directed, that, unless the said John A. Gibson or the said Mary L. Gibson or some one for them should within thirty days from the rising of the court pay said debts to said creditors, the special commissioners therein named should advertise and sell said lands as therein directed.

Now, although it has been held by this Court in the case of *Core v. Cunningham*, 27 W. Va. 206, that "transfers of property, either directly or indirectly, by an insolvent husband to his wife during coverture are justly regarded with suspicion, and, unless it clearly appears that the consideration was paid from the separate estate of the wife or by some one for her out of means not derived either directly or remotely from the husband, such transfers will be held fraudulent and void as to the creditors of the husband;" and the same, in substance, has been held by this court in *Lockhard v. Beckley*, 10 W. Va. 87; *Burt v. Timmons*, 29 W. Va. 441 (2 S. E. Rep. 780) and in many other cases. But in the case of

Hunter's Ex'rs v. Hunter, 10 W. Va. 321, it is held, that matters not charged in the bill or averred in the answer and not in issue in the cause are not proper to be considered upon the hearing. Also it is not error in a court to fail to pass upon the validity of a deed, when the record does not show, that it was called upon to do so by the pleadings in the cause. In that case it is also held, that the limitation of five years as to voluntary conveyances above referred to under Code, c. 104, s. 14, commences to run, at the time the deed was made. No fraud is charged as to the deed made to said Mary L. Gibson by said Martin and wife in 1866. Its validity is in no manner attacked, and there is no allegation or proof, that John A. Gibson then owed a dollar; and, for all that appears in this cause in any manner, she must be recognized as the true and lawful owner of the lot conveyed to her by the Martins in 1866, and to the extent of the value of said lot she must be held and considered as an owner of the tract of 390 acres, for which it was exchanged in part payment.

In the case of *Quidort's Adm'r v. Pergeaux*, 18 N. J. Eq. 472, it was held, that a deed taken in the name of the wife for property purchased with her separate estate is no fraud upon the creditors, even if the taking title in her name was to avoid any claim by judgment against her husband for debts, which he then owed. But where the balance of the purchase-money for such property was paid out of the earnings of a business carried on in the name of the wife, but to which the skill and labor of the husband largely contributed, such property will be decreed to be held by the wife in trust for his creditors, subject to her claim for the money advanced out of her separate estate.

In *Glidden v. Taylor*, 16 Ohio St. 509, it was decided "that where a wife suffers her money to be employed by the husband and blended with his earnings, so that it can not be separated, the most favorable position she can be allowed to assume is that of a preferred creditor in equity, and as such entitled to her money and interest."

In this case then I am of opinion, that the court below erred in directing a sale of said tract of 390 acres, without respecting the interest of the said Mary L. Gibson therein.

The court should have ascertained by a reference to a commissioner the value of the lot or parcel of land in the town of Sissonville, which was conveyed to her, by said Martin and wife in 1866; and in directing a sale of said tract of land should have decreed, that she was entitled to the proceeds of said sale in proportion to the amount of the purchase-money paid by her on said tract with said lot; and in order to do that the value of the other Sissonville lot would also have to be ascertained at the time of said exchange; and, in order that this may done, the decree complained of in this case must be reversed, and the cause remanded to the Circuit Court of Kanawha county for further proceedings to be had therein in accordance with the principles herein set forth, and the appellees must pay the cost of this appeal.

REVERSED. REMANDED.

CHARLESTON.

CARR v. WILSON.

*(GREEN, JUDGE, Absent.)

Submitted March 13, 1889.—Decided March 14, 1889.

1. VACANCY IN OFFICE—CONTESTED ELECTION—PRESIDENT OF SENATE—CONSTITUTIONAL LAW.

Where persons are voted for for governor at a regular election for the office of governor, but there has been no declaration of the result of the election by either the Speaker of the House of Delegates or the joint assembly of the two branches of the Legislature, and a contest for that office is pending before such joint assembly, and the declaration of the result has been by such assembly postponed until the decision of such contest, that does not create such condition of things, within the meaning of section 16, art. VII, of the constitution, as will entitle the President of the Senate to act as Governor.

2. VACANCY IN OFFICE—CONTESTED ELECTION—GOVERNOR—HOLDING OVER—CONSTITUTIONAL LAW.

In such case the governor elected for the next preceeding term has the right and is under duty, by virtue of section 6, art. IV,

*On account of illness.

of the constitution, to continue to discharge the duties of his office until a successor shall be declared elected.

3. VACANCY IN OFFICE—CONTESTED ELECTION—OATH OF OFFICE—PRESIDENT OF SENATE—CONSTITUTIONAL LAW.

The act of taking the official oath prescribed for governor by a candidate voted for for governor at such election, before a declaration of his election, under section 3, art. VII of the constitution, would not entitle him to take office, and his inability to take office for want of such declaration of election, whether he attempts to qualify or not, would not entitle the President of the Senate to act as Governor.

4. VACANCY IN OFFICE — CONTESTED ELECTION — GOVERNOR — DECLARATION OF ELECTION BY LEGISLATURE — CONSTITUTIONAL LAW.

A declaration of election to the office of governor, as provided for by sec. 3, art. VII, of the constitution, is indispensable to perfect and consummate the title to that office.

5. VACANCY IN OFFICE—GOVERNOR—HOLDING OVER—PRESIDENT OF SENATE—CONSTITUTIONAL LAW.

The provisions of the constitution limiting the term of office of governor to four years, and making him ineligible to re-election, do not prevent him from continuing to discharge the duties of his office after his term, under sec. 6, art. IV, of the constitution, in cases where the president of the senate can not act as governor, under section 16, art. VII, of the constitution.

Statement of the case by JUDGE BRANNON :

Rebort S. Carr is president of the Senate. He filed his petition in this court, averring that on the 4th of March, 1889, the office of Governor of the State had become and remains vacant, and that under sec. 16, art. VII, of the constitution it is his right and duty to act as Governor; that at the election last held for Governor Nathan Goff and A. B. Fleming were the two candidates receiving the highest number of votes for that office; that Goff claiming to have received a greater number than Fleming, on 4th of March, 1889, took the oath of office and demanded possession of the office, but that E. Willis Wilson, a private citizen found in its possession, refused to admit Goff; that Goff asked this Court for a *mandamus* to compel Wilson to surrender the office to him, but that the Court held, that he was not entitled to the writ for reasons stated in the opinion and decision of the court; and that the act of Goff in taking the oath was void and of no effect.

He further states in said petition that either Goff or Fleming was elected, but that both were and still are under such disability, as prevents their acting; that Fleming failed to qualify and for that reason and others is disabled from entering on the duties of the office; and that Goff for reasons stated in said opinion of this Court is disabled from so doing; also that he, Carr, demanded the office from Wilson and was refused admission, and he alleges in said petition, that Wilson had no right to the office. Carr asked a *mandamus* to compel Wilson to yield the possession of the office to him. By consent the petition stands as an alternative *mandamas*.

Wilson filed a return. It denies that any vacancy in the office exists, and that Carr has under the constitution any right to act as governor; and avers, that he under the constitution had the right and was under duty to continue in the discharge of the powers of the office, until his successor should be declared elected and should qualify. He admits, that said Goff and Fleming were candidates for Governor, each claiming to have received the highest number of votes. It avers, that, whether either received a majority of legal votes, or both an equal number, neither said Carr nor he could possibly know, as the returns of the election were sealed and transmitted to the Secretary of State, to be disposed of as directed by sec. 3, art. VII, of the constitution; that under the constitution said returns cannot be published, declared or made known except as by it provided; that in fact they had never been published and made known; that there is no law whereby they can be legally published except as set forth in said section 3; and therefore any averment of the petition that either Goff or Fleming had received a majority or had been elected, or did not receive an equal number of votes, is beyond the possibility of the petitioner's knowledge and therefore untrue. It avers, that neither Goff nor Fleming, nor any one else, had been declared elected, and therefore it was untrue, that either a failure to qualify or any disability or any condition of facts whatever had occurred concerning the governor which entitled Carr to act. It avers that Wilson was elected in October, 1884, governor for four years, beginning March 4, 1885, and that he was eligible to be so

elected and was declared elected and served as such governor for such term, and is still in the office performing its duties, his successor not having been declared elected and qualified, within the meaning, intent and requirement of the constitution. It avers that Goff and Fleming were candidates for governor at the election on the Tuesday after the first Monday in November, 1888, for the term commencing March 4, 1889, and both of them and no other person claimed to have been elected. It also avers that said Fleming instituted proceedings contesting the election of said Goff before the legislature in joint assembly at its session commencing on second Wednesday in January, 1889; that the petition and notice of contest of Fleming and the counter-petition and notice of Goff were presented, received and entered on the journals of both houses of the legislature and also in the joint assembly, and that the necessary steps were taken by the joint assembly and the houses for the trial of the contest. Copies of the journal are filed with the return.

It appears therefrom, that the joint assembly adopted a resolution referring to said contest and suspending the declaration of the result as to governor until the decision of said contest; and that it was the opinion and decision of said assembly, that the mere reading of the returns already opened (those from a few counties had been opened) should not be construed to give either Goff or Fleming any claim or right to the office, and that all the returns should be referred without reading any of them not yet opened to the joint committee provided by law relating to contests for the office of governor and be considered, as if none of said returns had been read. Such a committee was appointed to examine and report on the contest between Fleming and Goff, and all returns and papers relating to it were referred to the committee. It appears also, that on the 4th January, 1889, an order was made by the Circuit Court of Kanawha suspending the delivery of the certificates of the commissioners of that county as to the election for Governor. A resolution was passed extending the time for taking depositions in the contest until — day of May, 1889. Plaintiff, Carr, demurred to the return of said Wilson. The case was fully argued, and submitted to the decision of the court.

J. H. Ferguson for petitioner.

J. W. St. Clair and *E. W. Wilson* for respondent.

BRANNON, JUDGE:

President Carr bases his claim for the office of Governor on section 16, art VII, of the constitution, which reads as follows:

"In case of the death, conviction on impeachment, failure to qualify, resignation, or other disability of the governor, the president of the senate shall act as governor until the vacancy is filled or the disability removed." Gov. Wilson denies the application of that provision to the present circumstances, and, though his term of four years as governor has expired, he claims to hold over until his successor shall be declared elected and qualified, under sec. 6, art. IV, of the constitution, which reads as follows: "All officers elected or appointed under this constitution may, unless in cases herein otherwise provided for, be removed from office for official misconduct, incompetence, neglect of duty, or gross immorality, in such manner as may be prescribed by general laws, and unless so removed they shall continue to discharge the duties of their respective offices until their successors are elected or appointed and qualified."

Carr contends that, while it is true, that under section 6, art. IV, officers hold over beyond their term, until their successors are qualified, yet that that section itself says: "unless in cases herein otherwise provided for;" and that, if we turn to said section 16, art. VII, it is therein otherwise provided for, as follows: "That in case of the death, conviction on impeachment, failure to qualify, resignation, or other disability of the governor, the president of the senate shall act as governor."

Wilson maintains, that the words, "unless in cases herein otherwise provided for," apply only to removals of officers, not to the clause providing for holding over, as if it read, "all officers may be removed in such manner, as may be prescribed by general laws, unless in cases herein otherwise provided for," or as if the clause as to officers holding over were in another section. It is said, that as to removal it was nec-

essary to insert these words, because this section gives the legislature power to provide as to the manner of effecting removals from office, whereas section 9, art. IV, provides for the impeachment of all State-officers and their trial and removal by the senate, and the insertion of those words as to removals avoids any inconsistency. Their position (not at the opening of the section but after the word "may," which is a part of the verb "remove,") and their absence from the clause relating to officers continuing in office would seem, grammatically speaking, to confine them to the clause relating to removals. To connect them, also, with the other clause, we would have to transpose them to it and make it read: "and unless so removed, or unless in cases herein otherwise provided for, they shall continue to discharge" *etc.*, which Carr's counsel say should be done, but which the text of the section does not do. But I regard this matter not material; for, if they were not used at all, the general rule, that removals should be made, as might be prescribed by the legislature, would yield as to, or rather not apply to, those officers, who can be removed only by process of impeachment, for the legislature could not as to them prescribe another mode of removal.

And, as to the general rule that all officers shall hold over until their successors are qualified, that being a general rule would yield to a clause providing otherwise as to a particular officer, for instance, governor; as there would be as to that officer a provision applicable only to him, and as to him that particular provision would govern his particular case. Bish. Stat. Crimes, §§ 126, 390. Those words were inserted out of abundant caution and to give harmony to the face of the constitution. I do not think it material and so do not decide, whether those words relate to only one or both the sentences or clauses of said section 6. But, allow that they qualify both, it is plain, that it is a general rule in our constitution, that, "unless removed all officers shall continue to discharge the duties of their respective offices, until their successors are elected or appointed and qualified;" and the governor falls within the rule, unless some other provision takes him out of it as an exception to that rule, in which case, to the extent such other provision might go, he would be out of that general rule.

On search we find that section 16, art. VII of the constitution does, to the extent therein provided, take him out of the general rule by the language: "In case of the death, conviction on impeachment, failure to qualify, resignation, or other disability of the governor, the president of the senate shall act as governor, until the vacancy is filled or the disability removed." I should say, that under this provision, if Gen. Goff had been declared upon the face of the returns elected and had failed to qualify, the president of the senate would act as governor, ousting Gov. Wilson; for here would be a failure to qualify by the governor elected and so declared, and under the language quoted the president of the senate would come in. But the president of the senate can come into the office of governor, or rather act as governor temporarily *ex officio*, as president of the senate, only on the contingency or state of facts specified in section 16, art. VII; that is: "In case of the death, conviction on impeachment, failure to qualify, resignation, or other disability of the governor;" and under a legal rule of construction, where there is a general rule, exceptions must be strictly construed, and cases must clearly fall within the exceptions.

Now, the death, conviction or resignation of a governor is not suggested as existing as a ground for President Carr's claim. If it be said, that, because of the fact, that no one has been declared elected, no one has legally taken the oath of office, and that there exists a "failure to qualify," giving to the president of the senate for that reason under the words of the constitution a right to the office, the question arises: Has that contingency arisen within the true meaning of the constitution? As above stated, had Gen. Goff or any one else been declared elected and had he failed to qualify, that would be a failure to qualify within the meaning of the constitution. But no one has been declared elected. The constitution says, that the returns for governor from the counties shall be sealed and sent to the Secretary of State, who shall deliver them to the Speaker of the House, by whom they shall be opened in the presence of both houses of the Legislature, and the person having the highest number of votes shall be declared elected. Can we dispense with

this declaration required by the very letter of the constitution? Does the demand for such declarations embodied in the constitution mean nothing? Constitutional requirements are regarded, unlike statutory requirements, mandatory, not directory. Cooley, Const. Lim. 78, 83.

The court of appeals of New York in *People v. North*, 72 N. Y. 124, held, that where the act of the Legislature has provided in a town-charter, that the returns be laid before the council, and the person having the highest number of votes shall be declared duly elected, the declaration and certificate of the council "are necessary to complete the election of a ward-officer as well as a general officer of the city, and are indispensable to qualify the candidate to enter upon the duties of his office." The same court in *People v. Crissey*, 91 N. Y. 616, held, that the Legislature may provide the manner, in which the result of an election shall be determined and declared; that the power to declare the result must be lodged somewhere; and that, where the mode of so doing is commanded, until it is obeyed, and such acts are done, the election is not complete, and the candidate not qualified to serve; and the court held, that for want of such declaration the old officers held over. The constitution itself in this State requires this declaration by either the joint assembly or by the speaker in its presence. How do we know, legally speaking, for the purpose of qualification who is elected until such ascertainment? What do the certificates from the many counties show? They are secret, sealed and sacred under the constitution, and no one can answer the question until then. This court has held at this term, in *Goff v. Wilson*, *supra*, that for want of a declaration of his election Gen. Goff had no title and was not entitled to enter upon the duties of the office of governor. The constitution divides the government into three great departments, legislative, executive and judicial, and forbids either to exercise the functions of another. It provides, that the returns of the election for governor shall go before the two houses of the legislature, in order that their result may be declared. It provides, that a contest as to the governorship shall be tried by a joint assembly of those two houses. Their jurisdiction is exclusive in the exercise of this political function. The joint assembly has had these re-

turns before it; has suspended and postponed any declaration of the result as to governor until the decision of the contest between Gen. Goff and Judge Fleming. Whether that action was right or wrong, this Court has no jurisdiction to even indicate. The legislature is the sole tribunal to take action in that matter. We possess no power directly or indirectly to review or reverse that action. The whole matter, both the function of passing on the returns sent from the counties and that of deciding on the law and the evidence, the contest between Goff and Fleming, has been taken in charge under the mandate of the constitution by the Legislature, which is waiting for the evidence to be taken by the parties, and has merely continued the case for trial.

This Court can not directly or indirectly oust the Legislature of its jurisdiction and assuming superior wisdom and power arrogate to itself the function of saying, that either of the contestants was lawfully elected. To do so would be usurpation of unwarranted authority by this Court. Therefore this Court held, that for want of declaration of his election Gen. Goff could not have a *mandamus* to compel Gov. Wilson to admit him. If then President Carr bases his claim on a failure of Gen. Goff or any one else to qualify, the question arises: How can any one qualify, until after he has been declared elected? How can there be a failure to qualify, until there is some person in a condition to qualify? The only provisions as to qualification of officers are in Code 1887, c. 10, s. 7, requiring, that officers shall take the oath within sixty days, after they have "been duly declared elected," with the proviso as to the executive officers, that they shall do so "on or before the 4th of March next after they are declared elected, or before they exercise the duties of their respective offices." These provisions do not contemplate or provide for any officer taking the oath before he is declared elected. Thus, if the president of the senate demand the office on account of a failure to qualify by the elected governor, the answer is "There has been no failure to qualify legally speaking, because no person has as yet become entitled to qualify. How can there be a failure to qualify, when no person has been called upon to do so? The words "failure to qualify" mean failure to qualify as required

by law, such as would forfeit the office. But the statute has not demanded this qualification until after the declaration of election.

But the distinguished counsel for President Carr says that the failure of the Legislature to declare either Goff or Fleming or any one elected creates a vacancy or "disability of the governor," and under the constitution for that cause the president of the senate comes in. This is the ground chiefly, if not solely, relied on by him. Now the language is: "In case of the death, conviction on impeachment, failure to qualify, resignation or other disability of the governor, the president of the senate shall act as governor until the vacancy is filled or the disability is removed." It says disability of "the governor." But it must be by reason of the disability of, not one who was a mere candidate,—one not declared elected,—but of one who but for some disability attaching to him could act as governor. Before the president of the senate can act, there must be a person, whose duties and powers he assumes; in whose shoes he stands. He can exercise no functions but those of the man whose position he takes. The person on account of whose disability he becomes acting governor, must be not an incompetent governor, so far as the votes of the people and the authority selected to declare his election are concerned. They must have done all they were required by the constitution to do to make him governor. If anything essential to be done by them to complete his title be wanting, he is only partly governor, not fully so, not entitled to enter into the office. The constitution is not, in section 16, art. VII, making provision for the discharge of the duties of one, who under no circumstances is entitled or ready to perform such duties himself. The president of the senate acts on the death of the governor, or on the conviction on impeachment of the governor, or on the failure of the governor to qualify, or on the resignation of the governor, or other disability of the governor. There must be in any or all those occasions calling on the president of the senate to act one, who in law can be deemed a governor. But as yet no one has been declared governor. Such declaration is under the cases cited from New York and our decision in *Goff v. Wilson* indispensable to give any one title as governor, and, none of the candidates having been declared

elected, no one of them is such governor under that section of the constitution, as that the president of the senate can be called on to assume the functions in his stead, which functions such governor could not himself assume because of such disability.

Again, I do not think the non-declaration of the result of the election is a disability of the governor, such as is meant by the constitution. It is simply non-action or incomplete action by the agencies of the law assigned to vest the title in the candidate. It is not like insanity, conviction of the officer for crime, continued absence or other disability connected with the person of the governor. Death, conviction on impeachment, failure to qualify or resignation would produce a vacancy, and it would seem that the language "or other disability" means something of a different character from those cases named,—something attaching to the person of the governor and disabling him; and this construction seems confirmed by the after language of the section providing that "the president of the senate shall act as governor until the vacancy is filled or the disability is removed,"—thus using the words "vacancy" and "disability" as meaning different things; "vacancy" referring to death, conviction, failing to qualify, and resignation, but "disability" referring to something relating to the person, and for the time being disabling him, notwithstanding the use of the word "other." The words, "shall continue to discharge the duties of their respective offices until their successors are elected and qualified," seem to fit this case, where the proceedings leading to the completion of the election are yet pending but will end in the declaration of a result, when the governor will come on to qualify, while the other section, as to the president of the senate acting, seems to provide for a different class of cases; that is, where the election is complete, but there is a vacancy caused by death or other fact, or a disability preventing his action. In *Lawhorne's Case*, 18 Gratt. 93, the court under similar provisions in the Virginia constitution held, that the clause relating to the lieutenant-governor's acting in case of death or other cause disabling the governor did apply only to a case not provided for by the section authorizing officers to hold over.

Again, this position of President Carr assumes, that somebody was elected governor in November last. His petition says either Fleming or Goff was elected. Quite likely this is so. To succeed, he must have somebody elected at that election, so that he may have some one, whose place he is to take. But it does not appear, that anybody was in fact elected. The assertion of his petition, that some one was elected, even if not denied in respondent's answer, (but it is denied,) could not be taken for true, for it asserts as a fact, what, legally speaking, can not be yet known and is not susceptible of proof here. There is no declaration of the result, and the returns have never been approved or published; their contents are yet sealed and sacred, in the keeping of the joint assembly, awaiting publication. Can we or President Carr say, whether or not they show an election? They may show a tie vote. Is it clear, that we can presume, because an election was held, that some one was elected? The judge delivering the opinion in the court of appeals of New York in *People v. Crissey*, *supra*, says: "At this point it appears needful to determine, who was lawfully the alderman of the Seventh ward entitled to occupy the seat, for which Morrissey and Fleming contested. We cannot say, that either was elected. It is argued, that one must have been. That does not follow. A canvass, in which all or a majority of the inspectors concurred, or an investigation by a court of justice, in which the vote actually and honestly cast was correctly counted, might have resulted in a tie. While that is not probable, it is certainly possible. We can not know. We have no legal evidence before us from which we can give the seat to either by virtue of the election." He further said: "The votes are not here for us to count. The authority appointed by law has not acted, has certified nothing, and stands equally divided, and asserting contrary results, both of which can not be true." He also says: "For us nothing is possible except to treat the election as a failure, so far as either party seeks to found a right upon it, and deny to either any resulting benefit from that source." Under these principles the claim of President Carr, that some one was elected, and that he can stand on that fact as a foundation to entitle him to act, is untenable, as for the purposes of this

case the election is a failure, or has no yet known result, and he must be denied any resulting benefit from that source. And if it should appear, that there was a tie vote, in which case the Legislature would elect, that election would date and confer title only from the day of election and not relate back to the election in November, thus proving that no person was then elected. So no contingency has arisen, no condition exists, such as to call upon the president of the senate to act as governor. The clause of the constitution, on which he rests, is an exception to the general rule fixed by another clause, declaring that all officers shall continue to discharge their duties, until their successors are elected and qualified, and, as he does not come within that exception, he can not act, but under said general rule of section 6, art. IV, of the constitution, E. Willis Wilson has the right to continue to act as governor, until his successor shall come in.

We are in this cause called on by both sides to decide, not only whether Carr has title to admit him, but also whether Wilson has title to hold over; and, as we see it, we are compelled to pass on Wilson's right to hold over; for it seems certain that under these two provisions of the constitution, if Carr has title to enter into the office, Wilson has no title to continue to hold it. In deciding as to the right of the one we necessarily decide as to the right of the other. This case is unlike that of *Goff v. Wilson*, for there it was a question only of Goff's title. If his title was imperfect by reason of the absence of the declaration of his election, he failed, whether Wilson had title to hold over or not, and we did not in that cause pass on Wilson's right. If Goff's title had been complete, surely Wilson's tenure was at an end; if Goff's title was imperfect, he could not be admitted, though Wilson's claim to hold should be weak.

Mention has been made, though it does not seem to be urged, that under section 4, art. VII, of the constitution a governor is ineligible for the same office for the term succeeding that, for which he was elected, and therefore Gov. Wilson is not competent to hold over. I consider him holding over under his old term; it is a prolongation of that. His competency is tested by his eligibility for his old term. As he was eligible for that, he can hold under his old term,

and its eligibility and qualification, until his successor comes. He holds *ex officio*. In *Lawhorne's Case*, 18 Gratt. 85, a pardon was issued by Gov. Pierpont to a convict, after Pierpont's term expired, and the keeper of the penitentiary refused to obey it for that reason. The case went to the court of appeals of Virginia. Its constitution provided that "judges, and all other officers, whether elected or appointed, shall continue to discharge the duties of their respective offices, after their terms of service have expired, until their successors are qualified." Its constitution provided that "in case of the removal of the governor from office or of his death, failure to qualify, resignation, removal from the state or inability to discharge the powers and duties of the office the said office with its compensation shall devolve upon the lieutenant governor." There being no election of a governor,—no qualification of one,—the court held, that Gov. Pierpont should continue in his office beyond his term notwithstanding the latter provision; and held, that he was capable of holding over, though the Virginia constitution contained the same clause as to the ineligibility for a second term, as is found in ours.

For these reasons the demurrer to the return must be overruled, the peremptory writ of *mandamus* be denied, and the petition dismissed.

DISMISSED.

JUNE TERM 1889.

WHEELING.

LYON v. HORNER.

*(GREEN, JUDGE, absent.)

Submitted June 20, 1889.—Decided June 24, 1889.

1. SHERIFFS—NOTICE OF MOTION.

A notice to a sheriff under sec. 35, c. 41, Code 1887, may be in

*On account of illness.

the name of the plaintiff in the motion and need not be in the name of the state for the use of such plaintiff.

2. SHERIFF—SUSPENDING BOND—SURETIES.

A sheriff levies a writ of *feri facias* upon property. A claimant of the property gives a suspending bond. The sheriff returns the writ and said bond to the clerk's office and leaves the property in the possession of the debtor without security, and it is consumed by him. It is subsequently decided, that the property was liable for the writ. Upon a motion by the creditor against the sheriff and his sureties, they will be held liable to the creditor for the value of said property.

J. J. Davis and *J. P. Clifford* for plaintiffs in error.

J. Bassel for defendant in error.

SNYDER, PRESIDENT:

In February, 1884, a writ of *feri facias* was issued from the clerk's office of the Circuit Court of Harrison county upon a judgment in favor of James M. Lyon, executor, etc., against Franklin C. Stewart, W. J. Kester and Dexter Lowther, the two latter being the sureties of Stewart, returnable to April rules, 1884. The said writ came into the hands of T. M. Horner, deputy for James D. Horner, who was then the sheriff of said county. The said deputy-sheriff on February 15, 1884, levied the said writ upon certain personal property of Franklin C. Stewart, the principal debtor, among which were thirteen stacks of hay, which were claimed by Joanna M. Stewart. An indemnifying bond was required by the deputy-sheriff and given, and thereupon the said Joanna M. Stewart gave a suspending bond. The return on the writ shows these facts, and also that the officer returned the indemnifying and suspending bonds aforesaid to the said clerk's office with a writ of *feri facias*. The right of property to said thirteen stacks of hay was tried according to the statute, (sec. 5, c. 107, Code,) and a judgment rendered on June 1, 1885, that said hay was not the property of the claimant, Joanna M. Stewart, but that it was liable under said writ of *feri facias*.

No further action was taken by the sheriff to execute said writ, and on January 15, 1887, James M. Lyon, executor etc., the plaintiff in said *feri facias*, gave notice in writing to James D. Horner as sheriff and to Thomas M. Horner and

others, his sureties as such sheriff, in which after setting forth the issuance and return upon the said writ above mentioned he stated, that he would on January 26, 1887, move the Circuit Court of Harrison county to render judgment in his favor against said sheriff and his sureties for the sum of \$195.00, the value of said thirteen hay-stacks. The defendants appeared to said notice and moved the court to quash the same, which motion the court overruled; and on May 24, 1887, by consent of the parties the court in lieu of a jury tried the case and rendered judgment in favor of the plaintiff against the defendants, James D. and Thomas M. Horner, for \$130.00 and his costs, and the said defendants thereupon obtained this writ of error.

During the trial the defendants saved a bill of exceptions, in which all the facts proved are certified, from which in addition to the facts hereinbefore stated it appears, that the plaintiff among other matters proved, that the said *feri facias* had not been satisfied, that no forthcoming bond had been taken, and that said thirteen stacks of hay had been left by the sheriff in the possession of the debtor, Franklin C. Stewart, who had used and consumed the same prior to June 1, 1885, the time the right of property therein was determined; and that said hay, if it had not been so consumed, would have been worth on the said 1st day of June, 1885, \$10.00 per stack, aggregating \$130.00.

The first error assigned by the plaintiffs in error is, that the court improperly overruled their motion to quash the notice. In support of this assignment it is claimed, that the notice should have been in the name of the State for the use of the plaintiff, because it is provided in chapter 10 of the Code, that on all bonds payable to the State "suits may be prosecuted in the name of the State," *etc.* It is true, that this proceeding is in effect a suit on the sheriff's official bond, which is payable to the State, but the statute is merely permissive, and not mandatory. This proceeding is taken under section 35, c. 41, Code 1887, which declares, that the court may on the motion of the person entitled to recover give judgment *etc.* The form of the notice is not given, but the universal practice, so far as I know or can discover, both in this State and Virginia, ever since said statute was en-

acted, has been for the notice to be in the name of the plaintiff in the *feri facias*. *Chapman v. Chevis*, 9 Leigh, 297; *Stone v. Wilson*, 10 Gratt. 529; *Bank v. Horner*, 26 W. Va. 442.

No other objection is pointed out to the notice, and, according to the decisions of this Court, it seems to me to be sufficient, and that there was consequently no error in overruling the motion to quash it. *Bank v. Horner, supra*; *Board, etc. v. Parsons*, 22 W. Va. 308.

It is further contended for the plaintiffs in error, that the trial court erred in rendering judgment against them on the facts proved. It is insisted, that the *feri facias* was properly returned, when the suspending bond was given, and that, as the plaintiff failed to have a *venditioni exponas* issued as soon as the right to subject the hay to his debt was determined, the sheriff had no power or authority to sell it, and that consequently there was no default on the part of the sheriff in not making the sale. This position, it seems to me, involves an assumption, that is not law. It is well settled, that, if a writ of *feri facias* has been levied by the officer upon the property of the debtor before the return-day, he may sell the property so levied upon by virtue of said writ after the return-day thereof. *Cockerell v. Nichols*, 8 W. Va. 159. It is also well settled, that, where an officer makes a levy, the property levied upon is legally in his custody and at his risk. Unless he takes a forthcoming bond, he must keep the property in his possession, until it is sold or the debt satisfied. If he leaves it in the possession of the debtor, and it is thereby lost or consumed, he will be liable for its value. The giving of a suspending bond does not affect the liability of the officer for the property. Such bond merely suspends the sale and leaves the property in the custody of the officer. After the levy is made, it is the duty of the officer, not of the plaintiff, to see, that the property levied upon is legally kept and sold. Therefore, if the officer returns the writ, by virtue of which he made the levy, it is his duty to take out a *venditioni exponas* to sell the property. But a *venditioni* in the case at bar, if issued after the right to the property had been determined, would have availed nothing, because long before that time according to the proof the prop-

erty had been consumed by the debtor. The default was wholly on the part of the sheriff. Instead of keeping the property safely, he left it in the possession of the debtor without any security. He left it there at his risk, and, it having been lost to the creditor, the officer is liable.

This case, it seems to me, is too plain to justify any further discussion. The judgment of the circuit court is affirmed.

AFFIRMED.

32	436
35	451
32	436
62	538

WHEELING.

BULLINGTON v. NEWPORT NEWS & M. V. Co.

*(GREEN, JUDGE, absent.)

Submitted June 17, 1889.—Decided June 24, 1889.

1. DAMAGES—INSTRUCTIONS—RAILROADS.

In an action for damages against a railroad company for killing stock upon their track, the following instructions asked for and given at the instance of the plaintiff are not erroneous, evidence having been introduced before the jury tending to prove the hypothetical statements therein contained: "(1) If the jury believe from the evidence, that the defendant's engine and caboose killed the plaintiff's horses, and that the said caboose had upon it two brakemen and a conductor, and that the engine had the engineer and fireman aboard, and that, while the alarm-whistle was blowing, no brake was applied upon said caboose, but that said engine and caboose chased said horses and knocked them off without any apparent slowing of the train, then the said defendant is guilty of negligence, and the jury will find for the plaintiff. (2) If the jury believe from the evidence, that defendant's engine chased plaintiff's horses 600 or 800 feet, and that, when said horses were struck, said engine had not slacked its speed, then there was negligence on the part of the employes of the defendant to check or stop said train, and in that case they are instructed to find for the plaintiff. (3) If the jury believe from the evidence, that the defendant's train killed plaintiff's horses, and that said train was a light train; that it had upon it two brakemen, a fireman and engineer; and if they further be-

*On account of illness.

lieve from the evidence, that the alarm-whistle sounded 200 feet away from the horses, and that said brakemen and conductor took no steps to prevent the destruction of plaintiff's horses,—then and in that case there is not only a want of care but negligence on the part of the defendant, and the jury will find for the plaintiff."

2. DAMAGES—INSTRUCTIONS.

The jury in this case having fixed the damages at \$200.00, the value of the horses ascertained by the witnesses other than the plaintiff, without reference to any peculiar or particular value, it was not error in the court to reject the following instruction asked for by the defendant, as the defendant was not prejudiced thereby: "The court instructs the jury, that, while the measure of damages is the value of the stock when killed, that value is the market-value of such stock not some peculiar or particular value attached to it by plaintiff."

3. EVIDENCE.

A question propounded to a witness, who is not an expert, calling for his opinion, which is not responded to by said witness expressing his opinion, is not such an error as would prejudice the party excepting to said question.

4. EVIDENCE.

In the circumstances of this case it was not proper to ask the engineer, if he did all in his power to avoid striking the horses of the plaintiff; and the court did not err in rejecting said question.

L. A. Martin and Brown & Jackson for plaintiff in error.

Ferguson & Chilton for defendant in error.

ENGLISH, JUDGE:

This was a suit brought by D. H. Bullington before L. S. Lee, a justice of the peace of Kanawha county, on the 28th day of April, 1887, against the Newport News & Mississippi Valley Company, a corporation, for the recovery of damages for a wrong, in which damages were claimed amounting to \$250.00. It seems, that said corporation was operating a railroad through said county, and on the 24th day of April, 1887, a locomotive of defendant with tender and caboose attached under the control and management of the agents of said corporation killed two horses belonging to the plaintiff, which were grazing upon the commons near said railroad track at Brownstown, thereby damaging the plaintiff, as he claimed, to the amount of \$250.00. Said company appeared

before said justice and denied the allegations of the plaintiff's complaint, which in any way charged the killing of said horses to the negligence of defendant or any of its agents or employes, and pleaded not guilty to said complaint. The case was tried before a jury of six, who found for the plaintiff, and assessed his damages at \$200.00.

The defendant by its attorney moved said justice to set aside the said verdict, (1) because the same was contrary to law and the evidence and without sufficient evidence; (2) because the same was contrary to the instructions of the court; (3) because of erroneous rulings in giving and refusing instructions to the jury; (4) because of erroneous evidence allowed to go to the jury,—which motion was overruled, and the defendant then and there excepted and took a bill of exceptions setting forth all the evidence given and all the proceedings had before said justice, which was signed and sealed by said justice; and on the 11th day of July, 1887, the defendant sued out a writ of *certiorari* directed to said justice, reciting the fact of the rendition of said verdict in favor of the plaintiff for \$200.00, and judgment on the same requiring him to bring before the said Circuit Court of Kanawha county the record and proceedings had before him in the said action, including said judgment, in order that the same might be reviewed in and by said court and, if error be found therein, be reversed.

On the 6th day of January, 1888, the Circuit Court of Kanawha county proceeded to hear said cause upon said writ of *certiorari*, and upon the examination of said transcript held, that there was error in the judgment complained of in the petition for said writ, (1) in giving the several instructions to the jury asked for by the plaintiff; (2) in refusing to give the instructions asked for by the defendant; (3) in allowing improper evidence to go to the jury; (4) in refusing to set aside the verdict of the jury and grant the defendant a new trial; and not only reversed the judgment but dismissed the plaintiff's action.

Did the court below commit an error in reversing the judgment of said justice and dismissing the plaintiff's action?

Said court seems to have based its opinion first upon er-

roneous instructions given to the jury at the instance of the plaintiff. These instructions were three in number and read as follows:

"No. 1. If the jury believe from the evidence that the defendant's engine and caboose killed the plaintiff's horses, and the said caboose had upon it two brakemen and a conductor, and the engine had the engineer and fireman aboard, and that while the alarm-whistle was blowing no brake was applied upon said caboose, but that said engine and caboose chased said horses, and knocked them off, without any apparent slowing of the train, then the said defendant is guilty of negligence, and the jury will find for the plaintiff."

"No. 2. If the jury believe from the evidence that defendant's engine chased plaintiff's horses 600 or 800 feet, and that where said horses were struck said engine had not slacked its speed, then there was negligence on the part of the employes of the defendant to check or stop said train, and in that case they are instructed to find for the plaintiff."

"No. 3. If the jury believe from the evidence that defendant's train killed plaintiff's horses, and that said train was a light train; that it had upon it two brakemen, a fireman, and engineer; and if they further believe from the evidence that the alarm-whistle sounded 200 feet away from the horses, and that said brakemen and conductor took no steps to prevent the destruction of plaintiff's horses,—then, and in that case, there is not only a want of care, but negligence, on the part of defendant, and the jury will find for the plaintiff."

Now, while it has been held, that it is error to instruct a jury hypothetically upon a state of facts, when there is no evidence tending to prove such facts, and that it is error to instruct upon a conjectural state of facts, unless there is evidence tending to prove the same, (see *Winkler v. Railroad Co.*, 12 W. Va. 699; *Vinal v. Core*, 18 W. Va. 1,) yet, if the instruction propounds the law and does not mislead the jury, it should be given, (see *McClintic v. Ocheltree*, 4 W. Va. 249;) and in the case of *Railroad Co. v. Skeels*, 3 W. Va. 556, it was held "competent to instruct the jury that, if from the evidence they believe so and so, then certain consequences will follow."

The proper determination of the question as to the correctness of these three instructions requires us to look to the evidence, which was introduced before the jury, and see what it discloses in regard to the conduct of the defendant's employes in the management of their train about the time the horses were killed. Was there any evidence tending to show, that the ordinary precautions were not used by those in charge of the train, such precautions, as should be used when horses or stock of any character are discovered upon the track in front of a locomotive and train moving at the speed of twenty miles an hour?

Barney Haynes, the engineer on the locomotive, testified, that he saw one horse, the light one, a dun, coming up the bank above the culvert on the path. It started to run on the side of the track when he blew the whistle. It then jumped on the track. "I was about one telegraph pole or 200 feet away, as near as I can come at it, when I blew the whistle. The horse jumped on the track. I reversed my engine and opened the lever, and the tank-brake was set by the fireman, and the throttle was pulled open. The horse ran between 200 and 300 feet and stopped on the track" *etc.* On cross-examination he stated: "When I saw the horse I was running about twenty miles an hour, and when I struck the horse I was running about ten or twelve miles an hour."

On the other hand, Mrs. Snodgrass, Charles Workman, and C. A. Harrold, who were looking on, at the time said horses were killed, from points near the railroad, all state, that the train seemed to them to increase its speed, after the alarm-whistle was first sounded, until it struck the horses. Here there was evidence tending to prove that the speed of the train was increased instead of being slackened.

The court cannot pass upon the weight of the testimony without invading the province of the jury. These questions of fact must be left to the jury, and, as there appears to be evidence tending to prove the hypothetic statement contained in all three of the instructions given to the jury by the justice at the instance of the plaintiff, we can see no error in said instructions.

Instruction No. 9, which was asked for by the defendant and was refused by the court, is in these words: "The court

instructs the jury, that, while the measure of damages is the value of the stock, when killed that such value is the market value of such stock, and not some peculiar or particular value attached to it by the plaintiff." While we are of opinion that said instruction properly propounds the law in regard to the measure of damages in cases of this character, (see Sedg. Dam. 559, and note, and *Edwards v. Beebe*, 48 Barb. 106,) and it was error in the justice to reject such instruction, yet the error is not such as operated to the prejudice of the defendant in error, because on looking to the record we find that the jury found the damages to be \$200.00, which was the value placed upon the horses by disinterested witnesses, while the plaintiff claimed that they were worth to him \$250.00.

The next question to consider is, whether upon the trial of said action the justice ruled properly upon the admission and rejection of the testimony offered. The witness Charles Workman introduced by the plaintiff was asked: "If there had been an effort on the part of the persons in charge of the train, with appliances ordinarily used, could the train have been stopped or slowed up in the distance you have stated (meaning 450 feet) so as to have prevented the accident and injury to the horses of the plaintiff?" which question was objected to by defendant as leading and improper, which objection the court overruled. This witness had stated, that he lived in Brownstown, where, it appears, there was a station, and, although the question calls for his opinion, it seems to me, it was a question, upon which he might well express an opinion from every-day observation, although he was not an expert, and the defendant might easily have shown on cross-examination the weight and value of his opinion.

The next question objected to was one asked the witness Barney Mackinsbridge, who was introduced by the plaintiff and was asked: "Did you see or observe any effort on the part of those in charge of the train to slow up or prevent the accident and injury to plaintiff's horses?" I can not see, that any rule of evidence was violated or injustice done the defendant in allowing that question to be asked.

When the plaintiff had concluded his examination of witnesses in chief, the defendant by its counsel moved to strike

out all the evidence given on behalf of the plaintiff, upon the ground that the same was insufficient in law to entitle the plaintiff to a verdict and judgment, which motion was overruled, and the defendant excepted.

The defendant in introducing its testimony asked the witness Barney Haynes, the engineer: "Did you as engineer of that train do all in your power to prevent striking the horses of the plaintiff?" to which question the plaintiff objected, which objection the justice sustained. The witness was then asked: "Could you after seeing the horse have prevented striking it?" and the plaintiff objected, which objection was sustained. Both of these rulings I regard as correct, each question being improper. It would have been in accordance with the rules of evidence to let the witness state what he did, and allow the jury to judge as to whether he could have done more. The witness had already stated the distance of the horses from the train and their position with reference to the track, when he first discovered them, the movements made by the horses, and what was done by him with reference to the machinery of the train before the engine struck the horses. If anything was left undone by him, which he ought to have done, he could easily have stated it. It seems to me the jury were entitled to know what he did do; and that it was not proper to ask him if he did all in his power, as the jury might not know what was in his power, and the expression is very indefinite; and the other question asked is the same as the first in different language.

The next question asked this witness by plaintiff, and objected to by defendant, was as follows: "Do you say, that the four or five witnesses who have testified here that the horses was standing on the track before you whistled are all mistaken as to the horse's position, and that you alone knew its exact position?" While this question may assume some things, that did not exist, I do not think, that the defendant was prejudiced by allowing it to be answered, and the witness to again explain what he had said in reference to the position of the horses.

C. W. Matthews was asked by plaintiff: "Did you not consider the killing of these horses a great piece of carelessness on the part of the railroad employes, and did you not

so state to the plaintiff and his attorney and witnesses on the day first set for trial in this case?" The defendant objected, and the objection, as we think, was properly overruled, as the question was proper in laying the foundation for an impeachment of the witness.

The plaintiff then asked one Allison Myers this question: "Do you have any knowledge of how long it takes to stop an engine and tender running at the rate of twenty miles an hour, or in what distance it could be stopped in from any experience of yours, from observation or otherwise?" which was objected to by defendant, and the objection overruled. The witness had already stated, that he was forty one years of age, never worked on a train or engine, had lived on the railroad ever since it was built, but had no experience in running a train or engine. As a matter of course he could only speak from observation, but it does not seem to me, that the justice erred in allowing him to state, whether he had any knowledge in regard to said matters or not, nor do I see any good reason, why the next question asked the witness and objected to by the defendant should not have been answered by him, as it was.

D. P. Kegley, the next witness, who stated that he had had some experience as a brakeman on the C. & O. R. R., was asked by plaintiff to state in what distance such a train could be stopped from the west end of Lens Creek culvert going east,—how many feet,—if he knew the ground; and the defendant objected, and the objection was overruled, and he answered: "Well, I can't hardly tell. It looks to me like they ought to stop in 300 or 400 feet. It is a guess. I don't know; it is my opinion." The question was objectionable, yet the answer seems so indefinite and uncertain, that I do not think the defendant was prejudiced materially by it.

These are all the points raised by objections to the testimony in the case before the justice, and the evidence was certified, not the facts proved; and under the rulings in the case of *Black's Adm'rs v. Thomas*, 21 W. Va. 709, "the appellate court should not reverse the judgment, unless after rejecting all the conflicting parol evidence of the exceptor and giving full faith and credit to that of the adverse party the decision of the trial-court still appears to be wrong."

Applying these principles to this case I am of opinion, that the judgment of the Circuit Court of Kanawha county should be reversed; and this Court proceeding to render such judgment as should have been rendered by said Circuit Court, the judgment of said justice is affirmed; and the defendant in error must pay the costs of this writ of error.

AFFIRMED.

WHEELING.

JONES v. BROWSE.

*(GREEN, JUDGE, absent.)

Submitted June 18, 1889.—Decided June 24, 1889.

1. JUSTICE OF THE PEACE—APPEAL—PLEADING.

In an action commenced before a justice and taken by appeal to the Circuit Court, if the defendant files an informal plea, which sets up a valid defence to the action, the Circuit Court should not deny him the benefit of his defence, when the plea is such, that a person of common understanding may know what is intended by it.

2. REVIEW.

An action against a receiver as such can not be maintained without the leave of the court by which he was appointed.

H. M. Russell and *W. P. Hubbard* for plaintiff in error.

No appearance for defendant in error.

SNYDER, PRESIDENT :

This action was commenced before a justice of Pleasants county in the name of Simpson Jones for the use of T. W. Haines against R. H. Browse, special receiver for Jones & Haines, to recover \$300.00, money due by contract evidenced by an account in writing. The account filed is for \$386.00, to which is attached the affidavit of said Jones stating, that the account is just, and that no part of it has been paid. Judgment was rendered by default by the justice against the

*On account of illness.

defendant for \$300.00 and costs. Upon the petition of the defendant an appeal was allowed, and the case was duly docketed in the Circuit Court of Pleasants county. In said Circuit Court the defendant tendered an answer or plea, in which he averred that he did not assume to pay the demand set forth in the summons; and further, that he is an officer of the Circuit Court of Wood county, and as such can not be sued in another court without the leave of said court; that the possession of the defendant of the trust-property of Jones & Haines is the possession of said Circuit Court of Wood county, and that therefore the plaintiff ought not to have his action aforesaid against him *etc.* Upon objection by the plaintiff, the court rejected said plea, and, the defendant declining to further prosecute his appeal, the court dismissed the same, and in the same order it affirmed the judgment of the justice and ordered, that the plaintiff recover from the defendant \$300.00 with interest thereon from June 12, 1886, and his costs, and gave leave to the plaintiff to file his petition to the court in the chancery suits of *A. P. Riggs v. J. A. Armstrong, et al.*, and *Jones & Haines v. R. H. Gillespie et al.*, pending in the Circuit Court of Wood county, in which suits the defendant had been appointed special receiver to obtain payment of said judgment, but that no execution should issue thereon. From this judgment the defendant obtained this writ of error.

The action and proceedings in this case, both before the justice and in the Circuit Court appear to be anomalous, irregular and erroneous in almost every particular. The claim, upon which the action is founded, seems to be for a sum in excess of the jurisdiction of the justice. The account filed is against and for services rendered to "J. A. Armstrong and the Monitor Tow-Boat & Lumber Company," in which the name of the defendant nowhere appears; and, while the defendant is sued as special receiver for Jones & Haines, the judgments rendered by both the justice and the Circuit Court seem to be against the defendant personally. The Circuit Court after dismissing the defendant's appeal proceeded not only to affirm the judgment of the justice but also to render its own judgment against the defendant, and then inhibits the plaintiff from suing out

execution on either judgment. But aside from all these errors and irregularities the judgment of the Circuit Court must be reversed, because it rejected the answer or plea of the defendant. This plea, if it may be regarded as such, is certainly not in good form; but good form or technical accuracy is not required in cases originating in a justice's court. The statute designates the defendant's pleading in such cases an answer, which may be simply a denial or a statement of facts constituting a defence. No particular form is required; and it will be sufficient if it so states the defence relied upon as to enable a person of common understanding to know what is intended. *Poole v. Dilworth*, 26 W. Va. 583; *Todd v. Gates*, 20 W. Va. 464.

The defences set up by the defendant in this plea or answer are two: *First*, *non-assumpsit*, and *second*, that the defendant could not be sued as special receiver without leave of the court, by which he was appointed. The Circuit Court denied the right of the defendant to make either of these defences, when as a matter of law either of them, if proved, was a complete answer to the action. If the defendant never assumed the liability, for which he is sued, then certainly there could be no recovery against him either as receiver or personally.

The second defence is, that the defendant being a special receiver and as such the mere agent or hand of the Circuit Court of Wood county in respect to the liability, for which he is sued, the action against him is virtually an action against said court; and therefore he is not suable in any other court, without the leave of the court, which he represents. It is broadly laid down by High on Receivers, § 254, that it is in all cases necessary, that a person desiring to bring suit against a receiver should first obtain leave of the court appointing him. In *Barton v. Barbour*, 104 U. S. 126, it was held, that "no suit can be maintained against a receiver of a railroad company, who is by order of court conducting the business of a common carrier thereon, for injury to persons or property caused by his negligence or that of his servants, without leave of the court, by which he was appointed." This decision was affirmed in *Melendy v. Barbour*, 78 Va. 544. Every suit against a receiver as such is a proceeding set on foot to reach the assets in his hands and hence in the hands of the court, that ap-

pointed him ; for the judgment to be entered against him can only be payable out of the trust-funds in his hands. *Com. v. Runk*, 26 Pa. St. 235 ; *Peale v. Phipps*, 14 How. 368. If this action were allowed, we would have the anomaly of a justice attempting to adjust rights and enforce the payment of claims out of trust-property held by a Circuit Court, and which was being administered by it, without leave of that court and without regard to the rights and equities of other claimants to the fund. It would be a usurpation of the powers and duties belonging exclusively to the court and would render it impossible for the court to distribute the fund according to the rights and priorities of the trust-creditors.

It is no sufficient answer to say, that in the case at bar no such attempt was made, but that instead thereof leave was given to petition the court holding the fund for payment of the judgment, because this simply proves, that the court, which rendered the judgment, appreciated the difficulties, by which it was surrounded, and therefore refused to render an unconditional or enforceable judgment.

For these reasons the judgment of the Circuit Court must be reversed, and the case remanded for further proceedings.

REVERSED. REMANDED.

WHEELING.

ZINN v. LAW.

*(GREEN, JUDGE, absent.)

Submitted June 18, 1889.—Decided June 24, 1889.

1. HUSBAND AND WIFE—GIFTS.

Where a wife delivers money or property of her own to her husband, which he uses in his business, the presumption is, that such delivery was intended as a gift ; and in order to constitute such delivery a loan as against the creditors of the husband, the wife must prove an express promise of the husband to repay, or establish by the circumstances, that it was a loan, and not a gift.

*On account of illness.

32	447
37	384
37	401
32	447
38	753
32	447
41	302

32	447
52	52
32	447
56	347
57	487

32	447
62	485

32	447
65	678

2. HUSBAND AND WIFE—GIFTS.

When the facts and circumstances tend to show, that a gift was intended, and that the husband used and dealt with the property as his own, the mere parol testimony of the husband and wife of a private understanding between themselves, that the transaction was by them considered or intended as a loan to the husband by the wife and not a gift, will not as against the creditors of an insolvent husband rebut the presumption of a gift.

T. E. Davis for appellant.

Schilling & Pendleton for appellee.

SNYDER, PRESIDENT:

Suit in equity brought in September, 1886, in the Circuit Court of Calhoun county by Thomas G. Zinn against L. F. Law and Nancy E. Law, his wife, to subject a tract of 148 acres of land in said county to the payment of a judgment for \$252.68, recovered by him in said court at its June term, 1886, against the defendant, L. F. Law.

The bill avers, that the debt upon which said judgment was recovered, was contracted by said Law in March, 1882, and that at that time said Law was the owner of a steam saw-mill, engine and fixtures, and that he continued to own and operate said saw-mill, until about the time the plaintiff instituted his action at law on said debt; and that the said Law for the purpose of hindering and defrauding the plaintiff entered into a written agreement with one Mary Hays, dated November 23, 1885, by which he traded said saw-mill to said Hays for the said 148 acres of land, and \$600.00 in lumber and money, binding said Hays therein to convey said land to his wife, the defendant Nancy E. Law; that subsequently by deed dated December, 1885, said land was conveyed to said Nancy. The bill then avers, that said conveyance was voluntary as to the said Nancy and made for the purpose of hindering, delaying and defrauding the plaintiff and other creditors of the said Law, and prays, that said land may be held liable for and sold to pay the plaintiff's said judgment *etc.*

The defendant Nancy E. Law, by her answer denies, that said conveyance to her was either fraudulent or voluntary, but on the contrary avers, that she is the *bona fide* owner

thereof and paid a valuable consideration therefor; and then proceeding to state the consideration and the manner, in which she acquired the land, says, that she became the wife of L. F. Law in the year 1868, and that they have lived together as man and wife ever since; that in the year 1879 she received from her father, Henry Steinbeck, \$500.00; that in 1881 she received from her father-in-law, Andrew Law, \$100.00; and that prior to that time she received from her uncle, Christian Steinbeck, \$400.00; that about the year 1880 her husband under an agreement with her purchased of one Rollins a steam saw-mill, engine *etc.*, at the price of \$1,100.00, upon which Thomas E. Davis had a lien for about \$800.00, which her husband agreed to pay, and the other \$300.00 of the purchase-money was furnished by her upon an agreement with her husband, that the said saw-mill should be her property; that soon after the purchase of the said saw-mill she furnished to her husband the further sum of \$200.00, which was the residue of the money she had gotten from her father in 1879, to be used in making repairs on said mill; that in the year 1879 her husband bought on credit from one Ireland an interest in a grist-mill, which he traded to one Leggett for a tract of land; that with her consent her husband traded said land to Thomas E. Davis in payment of the lien held by him on the said saw-mill, and the money due to Ireland for said land was paid in sawing and work done at the saw-mill for Ireland and others; that said saw-mill, engine *etc.* were entirely paid for with her separate means and the increase from its investment, and no part of the purchase-money was paid with the money or means of her husband; that after this saw-mill had been thus paid for by her, it was traded for another saw-mill, and \$200.00 boot paid with her means; that in 1882 this last-named saw-mill was removed from Ritchie to Calhoun county, where in November, 1885, it was traded by her husband as her agent for the tract of 148 acres of land in controversy, and said land was conveyed to her as her separate estate; that by an oral agreement she made her husband her agent to handle and invest her money in all the aforesaid trades; and that he did not either directly or indirectly furnish any part of the means, which was paid for said land, save his own ser-

vices in making said trades and operating said saw-mills, but that the same was paid for by her own separate means derived as aforesaid from her father, uncle and father-in-law, and the proceeds of its investment. She further avers, that the said 148 acres of land have been sold for taxes, and that the title is vested in the State. The answer of the husband adopts and virtually reiterates the answer of his wife.

The cause was on June 16, 1887, heard upon the pleadings, exhibits and depositions, and a decree was then pronounced by the court dismissing the bill, and from that decree the plaintiff has appealed.

The only testimony filed by the defendants is their own depositions, in which they substantially testify to the facts set forth in their answer as above given. All the depositions are in a narrative form, and none of the witnesses were interrogated or cross-examined; but each was left free to frame his or her own statement without interference.

The plaintiff, besides his 'own' filed the depositions of two witnesses, viz., Thomas E. Davis and George M. Ireland. The plaintiff testifies, that he knows, that L. F. Law, the husband, bought the saw-mill and did a good deal of sawing and did the business in his own name and never mentioned his wife's name in any of his business transactions; that he claimed the mill as his own; and also that Law told witness, that he had traded the mill for the land and had the deed made to his wife, and thus got his business in such a shape, that witness could not make anything out of him.

Davis testifies, that in the year of 1880 he sold to L. F. Law a saw-mill, engine *etc.*, in this way: One Rollins was indebted to witness for said mill, and Law purchased it from Rollins, and witness took Law's notes for what was due on the mill; that Law had purchased an interest in a grist-mill, which he traded to Leggett for about forty acres of land, and Law arranged with Leggett to have said land conveyed to witness to pay off Law's notes for said saw-mill; that in this way Law paid for said saw-mill, and the wife of Law was not mentioned in the transaction.

Ireland testifies, that he sold to L. F. Law an interest in a grist-mill, for which he made Law a deed retaining a lien on the property for the purchase-money; that some

time thereafter Law informed witness, that he had traded this interest in the grist-mill to Leggett for a small tract of land and desired him to release the lien on the grist-mill and take a lien on the saw-mill, which Law had bought from Davis, and that witness did release said lien, and in lieu thereof Law give him a lien on the saw-mill; that Law afterwards paid off the lien on the saw-mill in money and sawing and a note on one Atha for \$91.00, except \$200.00 which is still unpaid; and this witness also testifies that the wife of Law had nothing to do with any of these transactions.

The foregoing is substantially all the testimony in this cause. In addition to this evidence the plaintiff relies upon the following facts to show, that the conveyance of the 148 acres of land to the wife of Law was intended to defraud the plaintiff and other creditors of L. F. Law: *First*, in the deed for the land to the wife a lien is retained to secure "the peaceable and undisturbed possession of said mill-property against any incumbrances of any kind by judgment-liens or otherwise," *second*, the written agreement for the exchange of the saw-mill for the land shows, that, as it was originally prepared, the wife of Law was not named as one of the contracting parties, but that afterwards her name was interlined; and, *third*, the claim of the wife in her answer, that the land had been sold for taxes. These facts, it is claimed, show the conduct of the parties to be so unusual and precautionary as to indicate a fraudulent purpose.

But, without giving any undue importance to these matters, it seems to me, that the Circuit Court erred in dismissing the plaintiff's bill. It is not denied as a general proposition, that, if a clearly valid, subsisting debt is established by a wife against her husband, he may pay it or prefer it in the conveyance of his property. But, where a husband becomes insolvent, the wife can not convert into debts, as against his creditors, former deliveries of her money or other property to him or permitted receipts by him of her income or proceeds of her separate estate, which at the time of such delivery or receipt were simply gifts intended by the wife to assist her husband in his business or to pay their common expenses of living; and considering the relation between

them the law does not, merely from such delivery or receipt, imply a promise on the part of the husband to repay or replace the same, as it would between parties not so related; but it requires more,—there must be either an express promise or circumstances attending the transaction to establish the fact, that they dealt with each other as debtor and creditor.

It would be exceedingly dangerous to permit the wife, after she has allowed her husband to use and expend her means for the common benefit of themselves and their children without any expectation of any return or the creation of a debt, when by mismanagement or misfortune of the husband he becomes unable to pay his debts, to raise up these gifts and convert them into loans to the prejudice of creditors, and support them by her own evidence, after the creditors had trusted the husband in total ignorance of any such liability. In transactions between husband and wife, which are impeached as fraudulent, it requires less proof to sustain the impeachment, and more and stricter proof to repel it, than would be required if the transaction were between strangers. A transfer of property either directly or indirectly by an insolvent husband to his wife is justly regarded with suspicion; and, unless it is clearly shown to be entirely free from an intent to withdraw the property from the husband's creditors, or the presumption of fraud be overcome by satisfactory affirmative proof, it will not be sustained. The foregoing principles are fully sustained by many decisions of this Court in cases, in which they were rigidly enforced. *McGinnis v. Curry*, 13 W. Va. 29; *Herzog v. Weiler*, 24 W. Va. 199; *Maxwell v. Hanshaw*, Id. 405; *Burt v. Timmons*, 29 W. Va. 441, (2 S. E. Rep. 780); *Bank v. Atkinson*, ante, 175.

Assuming that the wife, Mrs. Law, acquired from her father, uncle and father-in-law the money, as she claims in her answer and deposition, and that it was delivered to her husband and used by him in such manner, that the proceeds or a part thereof entered into the purchase of the land in controversy, the evidence wholly fails to prove, that the money was hers after it passed into the hands of her husband. In the absence of an express contract or circum-

stances, the legal presumption is, that the delivery of the money to her husband was a gift, and, as she has entirely failed to rebut this presumption, we must hold, that such delivery was a gift. There is no pretence of any express promise by the husband to repay the money. It is true the wife says, that by an oral agreement she made her husband her agent, and that the money was furnished to him with the understanding, that the mill was to be her property when purchased. But all the circumstances repel this claim. The husband purchased the first mill before she furnished him any money. He made all the subsequent trades and did all the business in his own name. He claimed the mill as his own, gave a lien upon it to secure his own debt, paid that debt from his own labor and the profits of the mill. In none of these transactions was his wife mentioned, nor did she in any respect make her claim known to any one dealing with her husband. It is entirely fair to conclude from all the facts and circumstances, that the suggestion of a loan or investment of the wife's money for her separate use never occurred to either the wife or the husband until insolvency overtook the husband, and some plausible device became necessary to shield the property from the pursuit of creditors.

I am therefore of opinion, that the said 148 acres of land is liable for the plaintiff's judgment, and that the decree of the Circuit Court must be reversed, and the cause remanded for further proceedings in accordance with the principles announced in this opinion.

REVERSED—REMANDED.

WHEELING.

ALDERSON v. COMMISSIONERS.

*(GREEN, JUDGE, absent.)

Submitted June 18, 1889.—Decided June 23, 1889.

1. APPEAL—CERTIORARI—CIRCUIT COURT.

Upon a writ of *certiorari* used as an appellate proceeding to bring to the Circuit Court for review a judgment or order of an inferior tribunal, the Circuit Court should decide all matters of law and fact, including those on the merits fairly arising on the record, either affirming such judgment or order, or reversing or modifying it, and should render such judgment, as the inferior tribunal should have rendered, or remand it to that tribunal, where further proceedings are necessary with distinct decision on the points involved in the latter event.

2. APPEAL—CIRCUIT COURT.

The Circuit Court, where such further proceedings are necessary can not retain and try the cause, but must remand it to the inferior tribunal for such proceedings.

3. APPEAL—COUNTY COMMISSIONERS—ELECTIONS.

County commissioners in canvassing returns of an election for congress on a re-count sign various exceptions for alleged errors taken by one of the candidates voted for, and the count is completed and result declared. The party excepting obtains a *certiorari* to review the action of commissioners, and the Circuit Court reverses it, and remands the matter to them, with directions to again perform the work of canvassing the returns. *Held*, that commissioners are not *functus officio*, but are yet competent to canvass the returns in compliance with the order of the Circuit Court.

J. W. St. Clair, Brown & Jackson and *O. Johnson* for plain-in error.

A. Burlew and *J. A. Hutchinson* for defendants in error

BRANNON, JUDGE:

John D. Alderson presented his petition to the Circuit Court of Kanawha county representing, that at the election on the 6th of November, 1888, he had received a large number of votes in all the counties of the Third District of this

*On account of illness.

38	454
39	468
39	630
38	609
32	454
35	60
39	454
30	22
32	454
45	759
32	454
46	298
32	454
47	91
47	518
47	836
32	454
48	36
48	308
32	454
49	579
49	734
49	741
32	454
66	14
32	454
60	61

State for representative in the Congress of the United States, and that James H. McGinnis also received a large number of votes for the same position; that on the 12th of November, 1888, the commissioners of the County Court of Kanawha county met to ascertain the result of said election in that county; that the certificates from the precincts showed, that Alderson received 3,329 votes, and McGinnis 4,658 votes; that he, Alderson, demanded a re-count of the ballots cast, and that said commissioners made such re-count, and the result of the re-count was for Alderson 3,341 votes, for McGinnis 4,638 votes, and that such re-count would elect Alderson; that said commissioners refused to accept the result as shown by their re-count and decided, that they would accept the result of the re-count of all the precincts except Alum Creek, St. Albans, Charleston, Coalburg and Lewiston, and as to them they would accept the returns as originally certified as to Alum Creek, St. Albans, and Charleston, and would reject all the ballots cast at Coalburg and Lewiston, and declared that in said county Alderson received 3,122 votes, and McGinnis 4,468 votes; that said commissioners examined witnesses as to the conduct of the election, and the swearing in of the officers of election, and refused said Alderson leave to cross-examine them or introduce other evidence on the subject, and that witnesses were examined tending to show, that ballots had been tampered with and altered at Charleston and St. Albans, and he was refused leave to introduce evidence to the contrary; that he moved the commissioners to declare the result as shown by the re-count, except Lewiston, Alum Creek and Fields Creek precincts, and to exclude them for certain causes in the record stated, and his motion was overruled; that he moved to declare, if Alum Creek should be counted, to take the result on the re-count of it, and also the re-count of Charleston, which motion the court overruled; that he moved the court to include the result on the re-count at Coalburg and St. Albans, which motion the court overruled; that he moved the court to exclude all ballots at West End and Fields Creek precincts, which motion the court overruled. Said petition gives the number of votes at the various precincts for each candidate on the original returns and the re-count.

It is not necessary here to give more of the contents of said petition or record, as this statement will show their nature. The writ of *certiorari* was awarded, and a judgment was rendered by the Circuit Court reversing the action of the county commissioners, and remanding the cause to them, with instructions, that they meet in special session "for the purpose of doing and performing the business, for which the commissioners of the said County Court were convened at the court-house of said county of Kanawha, on the 12th day of November, 1888, in relation to the election of representative in the Congress of the United States for the Third Congressional District of this State, among other things." Alderson moved the court to retain and try the cause and not remand it to the County Court, but his motion was overruled. He obtained a writ of error and complains, that the court remanded instead of retaining and trying the cause.

The first question is, did the Circuit Court err, as plaintiff contends in argument, in failing to decide all the points of error arising on the record and in sending the case back to the county commissioners without giving specific rulings or instructions to them on the points, so that the parties and commissioners might have the benefit of the decision of the Circuit Court as to them? There has been much difference of opinion as to the scope of the hearing of a writ of *certiorari*, as will be seen in the opinion in *Dryden v. Swinburn*, 15 W. Va. 234, and *Dryden v. Swinburn*, 20 W. Va. 89, some courts holding, that the writ touched only questions of jurisdiction, power or authority of inferior courts, or the regularity of its proceedings; others holding that all questions of law arising on the record could be passed on. The evident leaning of the courts of late has been to widen the field of this valuable remedial writ. I do not elaborate this matter, as I regard it settled by former decisions of this Court. In *Dryden v. Swinburn*, Judge GREEN, speaking for the court says:

"The cases above cited, while they all agree that a trial *de novo* cannot be had in a superior court in a case brought before it by *certiorari*, yet they by no means agree as to the judgment, which may be rendered. They agree, that, if no

error is found in the proceedings in the inferior court, its judgment should be affirmed; but they differ on the judgment to be rendered, if the judgment of the inferior court is found erroneous,—some holding in such a case all that the superior court can do is to render a judgment reversing the judgment of the inferior court; and others holding it may go further, and render such judgment as the inferior court ought to have done; * * * that is, they may modify the judgment of the inferior court, or reverse it *in toto*, and enter up a new judgment, or remand it to the inferior court for trial. This latter practice would certainly seem to be far the most convenient, especially where the inferior court is a court of record, but there are highly respectable authorities which deny the superior court the right, unless so authorized by statute, to do more than simply to reverse or annul the judgment of the inferior court; but the weight of authority is in favor of the power of the superior court, in a case brought before it by *certiorari*, to do more than simply to affirm or reverse the judgment of the inferior tribunal, and is in favor of the authority of the superior court to affirm the judgment below, or to reverse it, and remand it to the inferior court, or to modify its judgment, and, in short, to enter up such judgment as the court below ought to have done as in cases brought up by writ of error.”

Judge GREEN then expresses it as his opinion, that the court may, if it reverse, remand the cause to be further proceeded in or enter such judgment as the court below ought to have entered, and that the record alone is to be the basis of judgment in either case. Point 7 of the syllabus in that case is: “In all cases of *certiorari*, when used as an appellate proceeding, the superior court has a right to affirm the judgment of the inferior court, or to set aside and annul it, and enter up such judgment as the inferior court ought to have done, or remand the cause to it, as in a case brought up on writ of error.” In *Dryden v. Swinburn*, 20 W. Va. 89, it was decided that, “a case being brought before a Circuit Court by a writ of *certiorari* for review, it should review, not only jurisdictional questions and questions of irregularity in the proceedings of the inferior tribunal also, but all questions of law, and all actions alleged to be based on erroneous prin-

ciples, or taken in the absence of all evidence to justify such action."

It is therefore the duty of the inferior tribunal to make part of its record, if asked, all the facts necessary to enable the court to see upon what principles of law it has based its action, or whether there was any evidence to justify its action, and all the rulings and decisions of all law questions in the case, and all facts necessary to the proper understanding of all such rulings and decisions of such inferior tribunal. I do not think from the language of the syllabus in that case, that it was meant that under *certiorari* the superior court could weigh all the evidence on the merits, and find all the facts involved in the evidence as a jury, and reverse on that ground; and I am confirmed in this by a clause in the opinion in that case where, after saying that the practice on *certiorari* and writs of error should be similar, the Court seems to qualify that expression by saying :

"The errors which, in this state, are corrected on a writ of error are generally errors of law; and the juries and inferior tribunals are, as a general rule, held to be the sole judges of the weight of evidence, and their decisions on an issue of fact is rarely reversed or interfered with by the appellate court on a writ of error. It is true that the power in this State exists to grant a new trial on a writ of error, because the verdict is so contrary to the weight of evidence as to shock the conscience; and the appellate court in this State probably exercises this power thus, as it were, in a qualified manner, to review what seems to be a question of fact to an extent to which it would not be exercised in some states, those states, or some at least of them, never reviewing a question of fact on a writ of error." In *Poe v. Machine Works*, 24 W. Va. 517, the syllabus is: "The general rule is that upon *certiorari* to an inferior court the court awarding the writ will only inquire into errors and defects which go to the jurisdiction of the court below. But in this State, if the inferior tribunal proceeds in a summary manner, and not according to the course of the common law, and there is no remedy by appeal or writ of error, then the courts will consider other than jurisdictional questions." This case does not decide how far beyond jurisdictional questions the court will go. By these

decisions it has been held that on *certiorari* all questions of jurisdiction or regularity of proceeding in the inferior court could be decided, and also all questions of law arising on the record. But it has not been held that all the facts of the case involved in the evidence could be decided; that the superior court could take the place of a jury or the inferior tribunal, and weigh the evidence, and find and determine from it, whether a proper finding of the facts had been made in the court below on the merits. Certainly it may be said to be doubtful, whether our courts have gone so far. So much for the decisions in this State.

As expressing the law elsewhere and, I think in this State too, I quote section 4, tit. "Certiorari," 3 Amer. and Eng. Cyclop. Law, 62, sustained by authorities of many states: "When its scope is not enlarged by statute, *certiorari* lies only to correct errors in law, and not to review the evidence. According to the better view, however, it is proper to inquire whether there was any evidence to establish some essential fact, and also as to the rulings below upon the admission of alleged incompetent evidence, where no other and competent evidence was introduced tending to prove a necessary finding. But the record of an inferior court or other tribunal of matters in its jurisdiction can not be disputed by other evidence, nor its finding of facts, when supported by any competent evidence." Thus stood the law up to the passage of chapter 153, Acts 1882; Code 1887, p. 742.

Certiorari was not wide enough in its efficacy as a remedial writ; certainly, at least, it can be said there was doubt as to its scope. It was to cover a field for the correction of errors not covered by the writ of error or appeal. Why should it not afford in its field of operation the same relief against erroneous finding on the evidence, as would be afforded by a writ of error on a motion for a new trial, on the ground that the finding was without sufficient evidence or contrary to the evidence? To give it such efficiency, to remove all doubt as to its reach, that act was passed. It gives the writ in every case, matter or proceeding in which a *certiorari* might be issued as the law theretofore had been, and in every case, matter, or proceeding before a County Court, council of a city town, or village, justice, or other inferior tribunal. It pro-

vides, that "upon the hearing, the Circuit Court shall in addition to determining such questions, as might have been determined upon a *certiorari*, as the law heretofore was, review such judgment, order or proceedings of the County Court, council, justice, or other inferior tribunal upon the merits, determine all questions arising on the law and evidence, and render such judgment or make such order upon the whole matter, as law and justice may require."

Therefore, under the decisions of this Court, and the additional scope given the writ of *certiorari* by said act of 1882, a Circuit Court should decide every point on the law and evidence, law or fact, arising on the record before it, and render such judgment, as the inferior tribunal should have rendered, or remand the case to it, when further proceedings before it are necessary. It should in its judgment particularly and specifically decide on every point involved in the record, and make distinct for the guidance and direction of the inferior tribunal its decision on the several points by way of instructions or directions to it, so that the inferior tribunal may understand just what the law of those points is, and be able to conform in its further proceedings to such decision. This is important in practice, in order to avoid the same errors, and prevent further litigation, as without such guidance the inferior tribunal might simply repeat the same errors.

It is admitted by counsel for plaintiff, that a portion of the errors suggested were decided in his favor,—those committed by the commissioner's in refusing him the right to cross-examine witnesses introduced by the commissioners touching the administration or non-administration of the oath to officers of election, and refusing him right to introduce evidence; for the Circuit Court reversed the action of the commissioners, and pointedly instructed them to allow either of the parties to cross-examine any witness and to introduce witnesses and to appear by counsel or in person.

As to other questions, they were involved in or dependent on evidence,—as, for instance, whether the officers of election were sworn; whether the ballots had been tampered with and altered,—on which evidence offered by Alderson had been excluded. What that evidence would have shown, if it had been admitted, the Circuit Court could not see.

Without it a full decision of the case could not be had. The Circuit Court held, that its refusal was error against Alderson's right sufficient to reverse the judgment of the County Court and call for a new trial.

As to the question of the constitutionality of the act excluding precincts, where officers are not sworn, which, it is claimed, the court should have decided: if the court had decided the act constitutional, as under the then state of the case the Circuit Court might have decided, it would have excluded certain precincts,—Coalburg, for instance,—and included others,—Fields Creek, for instance;—but Alderson had offered evidence to show, that the officers at Coalburg were in fact sworn, and that at Fields Creek they were not. If the court had decided the act invalid, it would have been deciding a moot question; for perhaps the evidence would show no such question existed. But as to this constitutional question it is settled law, that out of respect to that high department of the government,—the law-making power so directly representing the popular will,—the courts will not even approach the question, whether its acts are valid under the constitution, unless there is no escape from it. The state of the case must command the decision. The courts will not decide it, when it is a moot question, when, at last, when the evidence is finally in, the question may not arise. Cooley, Const. Lim. 163.

We do not see, that the Circuit Court has omitted to decide any question, which it was proper to decide in the state of the case before it. It went as far as it was called on to go in the condition of the record. If the Circuit Court could not decide these matters, this Court can not. Even if there had been questions in the record, which the court ought to have decided but did not, this Court would likely not do so; as it decides, only after that court has performed its functions, and does not act, until that court has completed its function. *Armstrong v. Grafton*, 23 W. Va. 50.

Another question is: Should the Circuit Court have retained the case, and itself tried it and declared the result of the election after reversing the action of the commissioners? We think not. As above stated, until the act of 1882, there was no law to authorize a Circuit Court under *certiorari* to

weigh evidence and pass on the merits, though the evidence may have been incorporated into the record, and it was only to give *certiorari* the additional scope, so as to allow the court to pass on the merits under the whole evidence, that this act was passed. That was the evil to be remedied in the writ of *certiorari* by that act. It was to give *certiorari* in its field the same efficiency as a writ of error possessed in its appropriate field; to let the court "review" the case on the law and evidence, as it was before the lower tribunal, in order to determine, whether that tribunal had done injustice. It was not the purpose of the act to give a trial *de novo* in the Circuit Court. The act does not contain words to plainly convey that meaning. It says the Circuit Court shall "review" the judgment, not re-try the case; the word "review" seeming to mean, that the Circuit Court should go over again just what the lower court had considered. It does not say, that new evidence may be heard. To give the construction to the statute, that in every case, where a judgment or order of an inferior tribunal is reversed, the Circuit Court must retain and try the case *de novo*, would be productive of great inconvenience. In *Dryden v. Swinburn*, 15 W. Va. 235, it was held, that the Circuit Court could not retain for trial any case brought before it by *certiorari* to the judgment of the County Court; the twenty second section of chapter 17, Acts 1872-73, directing the retention of cases in the Circuit Court applying only to cases brought before it by appeal, writ of error or *supersedeas*, Judge GREEN saying that was the only law allowing a retention. It seems to me that decides this matter; for no statute has been cited—none is known to me—to call for such retention but the act of 1882, and we hold that it does not. The contention, that the Circuit Court had no jurisdiction to review by *certiorari* the action of the commissioners, as canvassers of the returns of elections is met by the decisions in *Chenowith v. Commissioners*, 26 W. Va. 230, and *Alderson v. Commissioners*, *supra* p. —, (8 S. E. Rep. 274, decided Dec. 5, 1888.)

It is argued, that the commissioners having once performed the duty assigned to them by law and having declared the result have no power to correct their errors, and that the Circuit Court could not remand the matter to them. The

commissioners are public officers of fixed term, who act ministerially as such in performance of a duty cast upon them by law,—the canvass of election returns. They begin the canvass and complete it; but they perform this duty erroneously, as is held by a court exercising a lawful jurisdiction to review their proceeding, and it sets their action aside and remands it back to them with the mandate to perform again the work for the correction of defects in their former action, and it is said they are *functus officio*, and can not obey this lawful mandate. They have begun this legal transaction but have not completed it and can not though ordered by a legal tribunal to do so. The very statement of the proposition is to me its own refutation. I regard the body continuous, and its work an entire thing, and that it is bound to complete its work, and the function is never performed, until the act is completed. The judgment is affirmed.

AFFIRMED.

WHEELING.

FRAME v. FRAME.

*(BRANNON, JUDGE, Absent.)

Submitted January 17, 1889.—Decided June 28, 1889.

1. SPECIFIC PERFORMANCE—PAROL CONTRACT—GIFT.

A court of equity will enforce a verbal promise made by a father to a son in consideration of love and affection to give him land and to make him a deed therefor, if the son induced by such promise has taken possession of the land and expended on it labor and money in improvements. (p. 475.)

2. SPECIFIC PERFORMANCE—CONDITION PRECEDENT.

But if, when such gift was made, the father required the son in a given time to put specified improvements on the land, such requirement would be regarded as a condition precedent to the right of the son to demand a deed; and the son, before he could acquire such deed, would have to prove that he put on the land in the time specified the specified improvements. (p. 483.)

*Rendered judgment below.

32	463
33	624
32	463
39	172
32	463
43	835
39	463
46	487
32	463
33	513
32	463
57	568
57	569

32	463
63	283
63	384

3. SPECIFIC PERFORMANCE—CONDITION PRECEDENT—TRUSTS AND TRESTEEES—NOTICE.

When the donor (the father) has put the donee (the son) in possession of the land, and the donee has fulfilled the conditions precedent attached to his gift and by improvements on the land acquired the equitable title thereto, a court of equity will regard the donor as trustee for the donee, and the possession of the donee of itself conveys notice to the world of his equitable title, and of his right to the legal title. (p. 477.)

4. SPECIFIC PERFORMANCE—LACHES.

But if the donor sells this land, and the legal title passes into the hands of persons, who are purchasers for valuable consideration without any actual notice of the donee's equity, and if the donee knowing that the donor has parted with his legal title, instead of promptly asserting his right to demand the legal title to the land delays the assertion of such demand for nineteen years and until after the death of the donor and of all others present, when the verbal gift was made, a court of equity will not enforce the making of the legal title to such land to such donee because of his laches. (p. 481.)

5. SPECIFIC PERFORMANCE—LACHES.

In such case, even if the rights of a third person had not intervened, a court of equity, if a suit to compel the donor to convey the legal title to the donee was not instituted for thirty one years, would not grant relief, if there was any trouble about the terms of the agreement or the conditions, on which the deed was to be made by the father to the son. (p. 482.)

Statement of the case by GREEN, JUDGE:

This was a chancery suit brought September 12, 1887, in the Circuit Court of Braxton county. The bill was filed at October rules, 1887, and it alleged, that the plaintiff, L. M. Frame, was the son of William B. Frame, deceased, who was a former resident in said county; that the plaintiff lived with his father and worked aided and assisted him on his farm till the plaintiff married on May 1, 1885; that the said father owned seven or eight different tracts of lands in said county, and being desirous of compensating the plaintiff for his services and of starting him in life proposed to him, if he would go upon a certain tract of land containing 100 acres situated on the south side of Elk river about one mile from Frame's mill in said county,—and cultivate and improve the same, that he would give him said land and make him a deed therefor; that that tract was granted to said William B. Frame by the commonwealth of Virginia by

patent dated September 30, 1846, a copy of which is filed with the bill showing the metes and bounds of the tract; that the plaintiff accepted the proposition and on or about May 12, 1855, moved upon said tract of land and has ever since lived upon said land claiming, as the bill says, and holding the same adversely to all the world openly, notoriously and exclusively from that day to this, a period over thirty two years, and that he still owns, possesses and claims the same; that some years after the plaintiff moved upon said tract of land, his father became the surety of one A. W. Wilson on a constable's bond in the month of May, 1868, and being apprehensive, that he might be made liable by reason of such suretyship for the default of said Wilson, he determined to convey all of his lands to his two sons, John W. Frame and Thomas J. Frame, and accordingly by deed bearing date the 26th of May, 1868, a copy of which was filed with the bill, he conveyed to his said two sons seven different tracts of land, one of the said tracts being the same tract, which thirteen years previously he had granted to the plaintiff and placed him in possession of; that the plaintiff is not advised why his father included the plaintiff's land in said conveyance; that "Certain it is, that it was never intended by his father or by his brothers to deprive him of the ownership or possession of said tract of land, even if they could legally have done so. His said brothers well knew all the facts in relation to the agreement under which he went into possession of said land; well knew his long possession, improvement, and cultivation of the same, and well knew he was entitled to a deed therefor. In fact, they never disputed the plaintiff's right to said land, never attempted to oust him from the possession thereof, never set up any claim thereto, nor did any act in the least tending to assert a claim thereto, except as hereinafter stated. The character of said conveyance was well understood by the said William B. Frame and his said two sons, the said William B. Frame remaining in possession of said lands, except the tract sold to the plaintiff, until his death, and paying taxes thereon, except the tract owned by the plaintiff, the taxes upon which were paid by the said plaintiff. It was not until July, 1886, that either of said brothers did any act which in the slight-

est asserted any claim to the plaintiff's land. On the 1st day of July, 1886, John H. Frame, by deed of that date, conveyed an undivided half of five of said tracts of land, including the tract owned by the plaintiff, to George Goad, trustee, to secure to Jelenko & Bro. the sum of \$482.54, evidenced by a negotiable note of that date and payable six months after date, also to secure to Jelenko & Loeb the sum of \$536.54, evidenced by note of that date, payable six months after date, with provision that upon default of payment of said notes or either of them said trustee should, upon request of the holder of said notes or either of them, sell the said undivided half of said land according to law for cash. A copy of said deed is here filed as part hereof, marked 'Exhibit No. 3.' The firm of Jelenko & Bro. is composed of the defendants Jacob Jelenko and Gustavus Jelenko, and the firm of Jelenko & Loeb is composed of the defendants William Jelenko and Charles Loeb. At the time of the conveyance by John H. Frame to said George Goad, trustee, the plaintiff was still in the open, notorious and exclusive possession of said 100 acres of land, and by law the said George Goad and Jacob Jelenko and Gustavus Jelenko and William Jelenko and Charles Loeb had constructive notice of the rights of the plaintiff to said 100 acres of land and his ownership thereof, and, in addition thereto, had actual notice of such right and ownership. That on the 22d day of August, 1877, the said John H. Frame having made default in the payment of said notes, the said George Goad, as trustee, sold the said undivided one half of said five tracts of land, including the plaintiff's tract of 100 acres, at public auction to the highest bidder, at which sale the said defendant Charles Loeb became the purchaser of said undivided one half of said five tracts of land, including the land of plaintiff, at the price of \$700.00. That the said George Goad is about to convey the same to the said Loeb by a deed as such trustee. The plaintiff says that the said deed from William B. Frame to his sons Thomas J. and John H. Frame, and the trust-deed from the said John H. Frame to the said Goad, constitute a cloud upon the title of the plaintiff to said 100 acres of land; and the deed from Goad to Loeb, when made, will still further cloud his title. He is

advised that he has a right to have said clouds removed, and to have specific execution of his said contract, made with his said father, and the legal title to said land conveyed to him. He therefore asks that said contract be specifically executed; that the said George Goad be restrained and enjoined from conveying the undivided one half of said 100 acres to the said Charles Loeb; that the said John H. Frame, Thomas J. Frame, George Goad, and the parties secured by said deed of trust, be held to have no interest in said 100 acres of land; that the clouds arising from the conveyance hereinbefore set out be removed by this honorable court; that the said John H. Frame, Thomas J. Frame, and George Goad be required to unite in a deed conveying said 100 acres of land to the plaintiff, and that he have such other, further, and general relief as the court may see fit to grant."

The parties defendant to this bill were the plaintiff's said two brothers and the trustee, George Goad, and said two firms secured by said deed of trust and Charles Loeb, the purchaser of this tract of land at the public sale under the deed of trust. The exhibits referred to in the bill were all filed with it. The following is the answer of Thomas J. Frame filed December 5, 1887:

"To the Hon. Henry Brannon, *etc.*—Defendant, for answer to said bill, says that he does not desire to controvert the right of the said L. M. Frame to have specific execution of his contract, as set out in said bill, and he here tenders a deed for all his right, title, and interest in the said 100 acre tract of land, and, having answered, asks to be hence dismissed, with his costs. THOMAS J. FRAME."

The deed referred to in this answer was filed with the answer; and thereupon the following order was made:

"Thomas J. Frame this day filed his answer to plaintiff's bill, to which the plaintiff replies generally, and the said Thomas J. Frame, having by his answer tendered a deed for all his right, title and interest in the tract of 100 acres of land in the bill mentioned, which deed is accepted by the plaintiff, it is ordered that this cause be dismissed as to the said Thomas J. Frame, but be retained for further proceedings against the other defendants; and said L. M. Frame hath leave to withdraw said deed from the papers of this cause."

At the October rules, 1887, all the other defendants other than John W. Frame filed their joint and several answer, which was as follows:

"These defendants, for answer to said bill, say that it is true, as alleged in the plaintiff's said bill, that defendants Jelenko & Bro. and Jelenko & Loeb were creditors of John H. Frame in the sums and at the times set out in the plaintiff's bill, respectively, and for which the said John H. Frame, in order to secure them in their respective sum on the — day of —, 188—, conveyed to the defendant George Goad, trustee, his undivided half interest in the five tracts of land in the plaintiff's bill mentioned, situated on Elk river, near Frame's Mill, in Braxton county, among which was a tract containing 100 acres, claimed by the plaintiff in his bill filed in this cause. It is also true that the said undivided half interests in the said five tracts of land conveyed to the said George Goad, trustee, as aforesaid, were on the 22d day of August, 1887, by order of the defendants Jelenko & Bro., and Jelenko & Loeb, sold by the said George Goad, trustee, after giving notice as required by law, at public auction, at the front door of the court-house of Braxton county, for cash, to Charles Loeb, at the price of \$700.00, he being the highest bidder therefor, which amount was paid on day of said sale by said Loeb. A deed was obtained by said Loeb from said trustee, on 1st day of October, 1887, which is here filed, marked 'Exhibit No. 1,' and made part of this answer. These respondents deny that the plaintiff ever had any title, or semblance of title, to the said 100 acres of land claimed by him in his said bill, or that his possession thereof was adverse and exclusive for the period of time alleged in his bill, or it ever was so held by him for any period of time from the time his said father obtained his grant from the commonwealth of Virginia therefor to the present time. These respondents here expressly deny ever having had any notice, either actual or constructive, of any claim of title by plaintiff to said tract of land, or of any right thereto by him whatever. These defendants, for further answer, say that they are advised and believe and charge that plaintiff never had any contract of purchase with his said father for said 100

acres of land, but that, if he had any such contract, it was without consideration, and can not affect the title of either George Goad, trustee, or defendant Charles Loeb, to said land; that if the plaintiff ever occupied, resided on, or controlled in any manner said tract of land in the life-time of his said father, it was a mere tenancy at will, and not under a contract of purchase. These defendants also deny that William B. Frame, in his life-time, ever made plaintiff any proposition to the effect that if he (plaintiff) would move upon said 100 acres of land, and improve it, that he would give said land to him. These defendants, having answered fully all material allegations in the plaintiff's bill charged, pray hence to be dismissed, with their costs in this behalf expended, and they will ever pray," *etc.*

The exhibits referred to in this answer were filed as exhibits with it. Depositions were taken both by the plaintiff and by the defendants.

The plaintiff proved by one witness, a nephew of William B. Frame, that the plaintiff, L. M. Frame, had had possession of and lived upon the 100 acre farm named and described in the bill for thirty one years, ever since 1856; that he, the witness, went to the residence of plaintiff's father one morning in 1856, and William B. Frame told him he had given the plaintiff, "Lemuel, a farm yesterday morning," and he pointed out this 100 acre tract, which was in sight, "across the river," as the farm he had given him; that he said he had given his other lands to John and Thomas, his sons; that he said that "Lemuel could go to work, or starve;" that he said they would have to give a woman, who was in the house on this farm, two bushels of corn in order to get her to leave and give up the house to Lemuel, so he could move in; that Lemuel Frame, the plaintiff, moved on to the place a week or ten days afterwards, and has been in the occupation of it ever since. The witness proved also, that he had since then gotten timber-trees off this tract of land; that he got the timber-trees of the plaintiff, L. M. Frame who always claimed this as his farm; that these trees were sawed for the witness at the mill of the plaintiff's father, William B. Frame, who knew, where they came from, but set up no claim to them; that he never disputed about them and never claimed,

that the plaintiff, L. M. Frame, did not own this tract of land, as he claimed.

The members of William B. Frame's family,—his wife, sons and daughter and a son of the plaintiff's family,—who were all examined, all testified, that they had never heard of William B. Frame's giving his sons John H. Frame and Thomas J. Frame any lands in 1856, as had been testified to by their cousin. But the daughter testified that she had lived with her father in 1856 up to 1864, and that at that time she heard him say frequently, he had given L. M. Frame the farm he claimed in this suit; that he moved on the land within a month, after it was given to him, and has lived on it ever since; that her father always called it "Lemuel's place."

The widow of William B. Frame, whom he married in 1864, testifies that she heard the same statement made by William B. Frame frequently; that she never heard him say, he had given any other lands to his other children in 1856.

The plaintiff himself testified, that he had lived on the 100 acre farm in controversy since the 18th or 20th of May, 1856; that his father gave it to him, and he moved on it and occupied it as his own, and he did not occupy it as a tenant of his father; that his occupancy of it had been open, notorious and visible; that he has cultivated the land, cleared it, fenced it and cut saw-logs from it; that he cleared and fenced of it some seventy two acres; that the whole of this was fenced prior to 1871; that he has planted on it 800 apple-trees and some fifty peach-trees, and, while the house he lived in was on the land, when he went there, he had put up another house on the land and a log stable; that John H. Frame and Thomas J. Frame, his brothers, to whom he had conveyed this and other tracts of land in 1868, frequently got timber-trees off of the land, buying them from him and not disputing his ownership of the land; that John H. Frame had in this way bought of him timber from this land in 1868 and 1869.

The plaintiff's son proved, that about eighteen months ago his father had offered to sell this farm of 100 acres to one T. A. Reip at \$50.00 for the house and garden and \$1.00 apiece for the bearing apple-trees and walnut-trees; that wit-

ness told John H. Frame of this offer, which had been declined; that J. H. Frame said witness's father had better reduce the price of the trees to fifty cents, rather than miss the sale; that he knew John H. Frame on several occasions to buy a stick of timber from this tract of land and pay witness's father for it; that his father had lived on this land from his earliest remembrance, and he was now thirty years old; that his father always claimed the farm as his own, and every one spoke of it as his father's farm; that his father had cleared and inclosed about three fourths of it; that on the other fourth was a maple-sugar orchard of fifteen or sixteen acres, from which his father made sugar every year; that he knew of his father more than once selling a stick of timber from this land to his grandfather, William B. Frame; that his grandfather bought one of these sticks of timber about 1866; that William B. Frame died in 1876.

It was also proved by other witnesses, that the plaintiff, L. M. Frame, had lived on this tract of land some thirty years; that during all that time he claimed it as his own farm; that, although it was taxed to his father, William B. Frame, till 1868, and after that to John H. Frame and Thomas J. Frame, yet the taxes were always paid by plaintiff, L. M. Frame; that about 1882 he refused to pay the taxes on this tract of land, unless the sheriff made out a separate receipt for this tract and did not have it, as it had been, on the receipt for the taxes of all the lands owned by John H. Frame and Thomas J. Frame; and that after that a separate receipt was made out by the sheriff for this tract of land; that the defendants, Jelenko & Bro. and Jelenko & Loeb were wholesale merchants doing business in Charleston, Kanawha county, W. Va.; that John H. Frame was a retail merchant at Frametown, Braxton county, W. Va.; that he purchased goods of these two wholesale firms in 1882 and continued thereafter to do so; that when he commenced doing business with these firms, they made inquiry of the clerk of the County Court of Braxton with reference to his financial condition, and what real estate he owned, and with what personal property he was taxed, and whether there were any liens on his property; that they were informed, that he owned a moiety of the seven tracts of land conveyed to him and his

brother, Thomas J. Frame, including the 100 acre tract now claimed by the plaintiff, L. M. Frame; that at the foot of a copy of the deed for these seven tracts of land from William B. Frame to Thomas J. Frame and John H. Frame was this memorandum, sent to a member of the firm by said county clerk: "The only lien on record against the above, so far as I have been able to find, is a judgment-lien against John H. Frame, in favor of Philip Frankenberger, for \$143.90 with interest from the 13th day of June, 1885, and \$1.90 costs. I find that John H. Frame is assessed on the personal property book of this county with the aggregate sum of \$96.00, consisting of three head of cattle, at \$40.00; two hogs, \$4.00; one watch or clock, at \$2.00; farming implements, \$5.00; household, *etc.*, \$45.00; I have given the boundary to each tract as it is in the deed above mentioned."

A member of one of the firms, Charles Loeb, went up to Braxton county to try and collect the amount due them for boots and shoes, which they had sold to John H. Frame, which amounted to \$536.54. He said he could not pay it but was willing to secure them on his real estate, if they would give him six months' longer credit. To this Charles Loeb, one of the members of said firm, agreed; whereupon John H. Frame gave his note for the balance due the firm payable in six months and a deed of trust dated July 1, 1886, on an undivided moiety of five tracts of land, including the 100 acre tract claimed by the plaintiff. "When I made this arrangement for my firm, Jelenko & Loeb, I also, as the agent of the firm of Jelenko & Bro., wholesale dry goods merchants in Charleston, settled the balance due them from him to Jelenko & Bro., bought of them by John H. Frame. This balance was \$482.54, for which he executed his note to Jelenko & Bro., dated July 1, 1886, payable in six months, which was secured by said deed of trust on said five tracts of land, including the 100 acre tract claimed by the plaintiff." This deed was executed and duly acknowledged by both John H. Frame and his wife, Amanda Frame and recorded in the office of the clerk county court of Braxton county, on July 2, 1886. The trustee in this deed of trust, George Goad, pursuant to the provisions therein, sold the said one undivided moiety of these five several tracts of land, and

Charles Loeb became the purchaser thereof for \$700.00, which being paid in cash, said trustee executed and delivered to him a deed for one undivided moiety of these five tracts of land including this 100 acre tract claimed by the plaintiff. This deed is filed with the answer of the defendants, it having been recorded.

A lawyer on behalf of Lemuel M. Frame, when these lands were offered for sale, and before they were sold, publicly announced, that the party purchasing this 100 acre tract claimed by Lemuel M. Frame could not get any title thereto, as he had claimed the land for thirty years and lived upon it, and the trustee, Goad, said: "Certainly, you can only get such title as is in me."

J. F. Brown for appellants.

W. E. R. Byrne for appellee.

GREEN, JUDGE:

The first question presented by this record is: Will a court of equity specifically enforce in any case or against any one a verbal gift of land from a father to a child, as in some cases it is difficult, if not impossible, in principle to distinguish gifts and sales? I will before considering directly this question state briefly the law in reference to the specific enforcement of verbal sales of land and the principles, on which it is based.

By the statute of frauds passed in 1677 and a similar statute to be found wherever the common-law prevails "No action shall be brought upon any contract or sale of land, tenements or hereditaments or interest in or concerning them, unless the agreement, upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or by some person thereunto by him lawfully authorized." Code 1887, c. 98. The English courts very soon after the passage of their statute of frauds took the view, that, while the chancery courts were as much bound by this statute as the common-law courts, yet, as it was the peculiar province of a chancery court to relieve against fraud, a court of chancery despite this statute would specifically enforce a verbal

contract for the sale of land, when the refusal to execute the contract would itself amount to the practicing of fraud by the defendant on the plaintiff. In so doing, they said, they were engrafting no exception on this statute but simply proceeding to prevent fraud upon general principles, which prevailed universally in courts of equity; and it would never do to so construe the statute of frauds, as to promote instead of suppressing fraud, as it was intended to do. Browne, Stat. Frauds, § 457

If the defendant has partly performed his part of such contract, and his act of part-performance is incapable of compensation in damages, it would obviously be fraud on the plaintiff to permit the defendant to refuse to execute such contract, because it was verbal; and in such case a court of equity will compel the specific performance of such verbal contract. If, for example, the vendor of real estate by a verbal contract has delivered possession of the land to the vendee, this will entitle the vendee, who is in possession of the land, to compel a specific performance of the contract by making a deed therefor on the payment of the purchase-money; for otherwise the vendor might sue the vendee as a trespasser, and to permit him to do so, after he has put the vendee in possession under the verbal contract, would be to permit him to take advantage of his own wrong in repudiating his obligation, and it would be punishing the vendee, who has complied with his own obligation. If the vendee has taken possession of the land, the courts regard, that the wrong done by compelling him to surrender the possession of it as a trespasser is such an injury, as could not be compensated in damages, and hence there is no other way of punishing the recalcitrant vendor for committing a fraud on the vendee, who has complied with his contract, by treating him as a trespasser. The authorities supporting these views are numerous, both in England and America. See 2 Lomax, Dig. p. (40,) 55; 1 Story, Eq. Jur. § 761; Wat. Spec. Perf. § 270.

It is also settled both in England and America, that, if the vendee under a verbal agreement for the purchase of real estate expends labor or money in improving the same, the contract is thereby partly performed, and the statute of frauds

has no application to it. In such a case the improvements by the vendee in possession constitute valuable and equitable consideration and entitle him to specific execution of the contract, which he complies with fully on his part.

There is, then, *first*, the verbal agreement; *second*, the delivery and taking possession of the estate in accordance with the agreement; and, *third*, the expenditure of money in consequence and in faith of the agreement; and, *fourth*, a complete compliance with the agreement on the part of the vendee by the payment of the entire purchase-money. If the first of these circumstances alone exists, the statute of frauds denies all remedy. When the second ensues, the vendee has partly performed his contract and has taken a step, which would render it a fraud on the part of the vendor to divest him of his possession and refuse him a deed. When the third circumstance follows in expenditures to improve the land, all the powers of equity are summoned into action to protect the vendee on several grounds, each sufficient and each distinct in its nature. It will then, when the vendee fully complies with his contract, compel specific execution by the vendor, because—*first*, it would be a fraud in him to refuse it; *secondly*, he would profit by his own fraud in acquiring the improvements with the land he sold; and *thirdly*, the vendee has introduced a valuable consideration, which, if he should lose it, could not be restored to him and is not ordinarily of a nature to be compensated in damages. These views are well sustained by both English and American authorities. See 1 Sugd. Vend. (8th Amer. Ed.) p. (151,) 226; 1 Story, Eq. Jur. § 861; Browne, Stat. Frauds, § 487a; Wat. Spec. Perf. § 280; *Rhea v. Jordan*, 28 Gratt. 683; *Tracy v. Tracy*, 14 W. Va. 243.

If a donee being a child under a parol gift of real estate by a father take possession and expend money or labor to improve it, as against the donor he stands upon the same footing as a purchaser for a valuable consideration. The statute of frauds has no application to the transaction, and equity will compel its specific performance by requiring him to execute his deed to consummate his gift.

We will now consider parol gifts specially. If A. points to a house and lot and says to his child, B.: "I give you this

house and lot," and B. says; "I accept the gift," and nothing more passes in reference to the matter, a court of equity will take no cognizance of it. B., if he had paid A. for the house and lot without taking possession, could not compel him to execute a deed, because he could have his remedy in recovering the money, he had paid, with interest in a court of law. *A fortiori* a court of equity will not entertain B. when he has paid nothing; and, if B. should sue at law, he can recover nothing, because A's promise or gift was without consideration,—a *nudum pactum*,—and B. has suffered no damages. The donee has not changed his situation, and there is no basis for an appeal to a court of equity to interpose. But suppose B. enters the house and makes it his home and goes on to act as owner and improves the premises by the expenditure of money or labor. He digs ditches and enriches the land. He builds fences for its permanent protection. He sets out trees, clears the land and lives in the house. These acts change the situation and fix the gift. Why? Because valuable consideration has now entered into the transaction. The agreement of gift has been partly performed by acts which can not be undone. A valuable consideration may be a detriment to the promisee or a benefit to the promisor. What was in its inception—promise sustained only by a good consideration—the love and affection of a father to a child—has by such acts become in effect a promise sustained by a valuable consideration.

It may be regarded as settled law in this state and in Virginia, that a verbal donee of land, a child, who under the verbal gift has taken possession of the land and improved it, has a right to demand in a court of equity a specific performance of the contract by the execution of a deed by the father, thereby consummating his verbal gift. This was so held in *Shobe's Ex'rs v. Carr*, 3 Munf. 10, decided as long ago as 1811, and this case has been repeatedly followed or recognized as law by numerous Virginia decisions ever since. See *Darlington v. McCool*, 1 Leigh, 36; *Reed's Heirs v. Vannorsdale*, 2 Leigh, 569; *Pigg v. Corder*, 12 Leigh, 69; *Cox v. Cox*, 26 Gratt. 305. There are also numerous authorities in other states to the like effect. *Freeman v. Freeman*, 43 N. Y. 34; *Lobdell v. Lobdell*, 33 How. Pr. 347; *Shepherd v.*

Bevin, 9 Gill, 32; *Young v. Glendenning*, 6 Watts, 510; *Galbraith v. Galbraith*, 5 Kan. 409; *Kurtz v. Hibner*, 55 Ill. 521; *McLain v. School-Directors*, 51 Pa. St. 196; *Neale v. Neales*, 9 Wall. 1; *Hardesty v. Richardson*, 44 Md. 617.

If however a father give his child verbally a farm and put him in possession thereof, but the child neither spends money nor labor in improving the land, it is very questionable in Virginia and in West Virginia, whether the child in a court of equity can compel the father to make him a deed. It was so decided in the cases of *Stokes v. Oliver*, 76 Va. 72, and *Keffer v. Grayson*, Id. 517. In these cases it was held, that the love and affection of a father to a child is not enough of itself to warrant a decree for a specific performance, even when the agreement to make the gift is in writing, and the child is in possession of the farm. But the contrary was held by this Court in *Marling v. Marling*, 9 W. Va. 79. But, in delivering the opinion of the court in that case on page 95 I express my own opinion, that, while such agreement need not be under seal, it must be a formal agreement in writing duly delivered as such, and while in such case, the consideration being good though not valuable, a court of equity can properly dispense with the seal to it, yet it can not dispense with its being a formal agreement in writing; and a verbal agreement to give a farm to a child can not be enforced specifically, even when the child has been put in possession of the farm. Such agreements of gift, when performed in part by putting the donee in possession, have been enforced in some states. See TILGHMAN, C. J., in *Lessee of Syler v. Eckhart*, 1 Bin. 380; Big Fraud, 386; Smith, Eq. 254, 255; *Mahon v. Baker*, 26 Pa. St. 519. And it must be admitted that the reasoning, which supports the enforcement of a verbal contract of sale partly performed by the simple delivery of possession, appears equally applicable, when there is a verbal gift of land by a father to a child accompanied by the delivery of the possession of the land. See 1 Story, Eq. Jur. § 761, and articles of John W. Daniel in the April, 1883, number of Virginia Law Journal, where the question we are considering is elaborately discussed in an able article. Many of the views taken in said article I have adopted in this opinion.

I have thus far been discussing the right of a donee or vendee of real estate by a verbal agreement to enforce specifically such verbal agreement, when the donor has put the donee in possession of the land. We will now consider, whether the law is modified, when the vendee or donee in possession of the land seeks to have his contract specifically enforced against a subsequent purchaser for valuable consideration of the donor, or against a judgment-creditor of the vendor or donor.

In the first place it must be observed, that, when the vendee or donee is in possession of the land openly and notoriously living upon it, for instance, there can not be a purchaser of the land for valuable consideration without notice from the vendor or donor, because such possession by the vendee or donee of itself conveys notice to the whole world of the equitable title of the vendee or donee and of his right to the legal title, the possession of realty being the fact of most comprehensive and far-reaching consequences, that bears upon its title. The perfect legal title was originally conferred by this delivery of possession or livery of seisin. A fee was not perfect without this delivery of possession, but, if accompanied by such delivery of possession, it was perfect, even though it was a mere verbal transfer. The earth has been described as that universal manuscript, open to the eyes of all. When therefore a man proposes to buy or deal with realty, his first duty is to read this public manuscript, that is, to look and see, who is there upon it, and what are his rights there. And, if the person in possession has an equitable title to it, he is as much bound to respect it, as if it was a perfect legal title evidenced by a deed duly recorded. See 2 Sugd. Vend. 866; Sedg. & W. Tr. Title Land, § 717; 1 Story, Eq. Jur. § 400; Big. Fraud, 293, 294; *Floyd v. Harding*, 28 Gratt. 410; *Merithrew v. Andrews*, 44 Barb. 207; *Grimstone v. Carter*, 3 Paige, 421; *Hadduck v. Wilmarth*, 5 N. H. 181; *Knox v. Thompson*, 1 Litt. (Ky.) 350; *Tuttle v. Jackson*, 6 Wend. 213; *Parks v. Jackson*, 11 Wend. 442; *Morgan v. Morgan*, 3 Stew. (Ala.) 383.

When the sale or gift of the land is by a verbal agreement, the terms of such agreement must be definite and made out with reasonable certainty. See *Wright v. Pucket*, 22 Gratt.

370. By reasonable certainty is not meant a mathematical certainty; but what is meant is, that the evidence adduced must leave the court satisfied and convinced as to the terms of the agreement, and it must be so definite as to guide the court safely into carrying it into execution.

The plaintiff, who seeks a specific performance of a verbal contract or gift of land, or indeed who seeks the aid of a court of equity to enforce any equitable right, must show, that he has used reasonable diligence, and that his claim is not a stale claim. See 1 Bart. Ch'y Pr. § 23. As there stated, it is a familiar doctrine of the courts of equity, that nothing can call them into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing.

We will assume, first, that a verbal gift of this 100 acres of land patented to William B. Frame September 30, 1846, was by him about May 12, 1856, made to his son, Lemuel M. Frame, and that the donee then took possession of the land exercising an undisputed ownership over it from that time, selling timber grown on it to his father and others, and had lived upon it and cleared it and cultivated it ever since, and that considerable time and money had been spent by him in improving it. These facts the counsel of the plaintiff, L. M. Frame, regards as clearly proven. If they are really proven with the requisite degree of distinctness and certainty, then on the authorities, we have cited, it would seem clear, that the son of L. M. Frame had a right to specifically enforce this agreement against his father, William B. Frame, provided he used reasonable diligence in instituting his suit and did not permit his claim to become too stale, before he brought his suit.

It is claimed by the plaintiff, L. M. Frame, that he was in the exclusive and uninterrupted possession of this farm claiming against all the world and especially against his father, the donor,—actually selling him timber grown thereon. It was unnecessary for him to institute this suit, while this state of things existed. The donee, L. M. Frame, was not called upon to act, no one disputing his right to the same, and he having held possession and use of it. There is much strength in this view; and so long as this state of things existed, the

court might be disposed to excuse the plaintiff for not instituting this suit for a specific performance. How long did this state of things exist? The record shows, until May 26, 1868, but not thereafter; for William B. Frame, the father, exercised the most decisive act of ownership over this 100 acre tract; as on that day for a consideration stated on the face of the deed to have been \$500.00 he and his wife conveyed to their sons Thomas J. and John W. Frame seven different tracts of land including the tract of 100 acres claimed to have been given verbally to said L. M. Frame thirteen years before. This put it entirely out of his power to make a deed of this land to L. M. Frame. Knowing that he could not acquire a valid title for this tract of land, on which he was living, except by instituting in a court of equity a suit for the specific performance of the verbal agreement to give it to him, made by his father some thirteen years before, he never could have acquired a good title to it by living upon it, claiming it as his own, and exercising rights of ownership over it, no matter how notorious, undisputed and exclusive such possession was; for, as he entered upon the land by permission of his father, who had legal title, his possession was admitted in subordination to his father's title, and was not therefore and could not become adversary to his father's title or the title of those claiming by deed under his father. See *Hudson v. Putney*, 14 W. Va. 561. He knew therefore as early as June, 1868, that, if he wanted a title to this 100 acre tract, on which he lived, he would have to get it by asking a court of equity to compel the legal owners to convey the land to him, as the true equitable owner. It was his duty therefore, if he did not mean to abandon his equitable title, to institute this suit in a reasonable time after January 1, 1868.

It may be said, that he did not know, that his father then conveyed this tract of land to his two brothers. But though, perhaps, we can not assume, that he knew this deed was made to his brothers by his father, simply because it was promptly put on record, yet there is his own statement in his deposition of facts, which shows, that he did know of the making of this deed to his brothers; for he says he always paid the taxes on this land, though it was taxed in his father's name

until 1868, and then in the name of his brothers; that the tax-bill was thus made out, and he paid the taxes on this tract, though the tax-bills were made out against his brothers, and that he refused to pay them after a while, if not differently made out. He was thus reminded each year by these tax-bills, that the legal title of this land was in his father till 1868 and after that in his brothers. It was clearly his duty, when it was thus made known to him, that he could not acquire legal title to this land except by suit, to bring such suit with reasonable promptness, especially as thirteen years had already expired, since he claimed the equitable right to this land. But he did not institute such suit for more than nineteen years, some thirty two years after the alleged verbal promise of his father to give him this land. In the mean time his father had died and one of his brothers, to whom in 1868 his father had conveyed this land. And the records of the clerk of the County Court showed, that upon the fact, that he owned this land, this brother had acquired a credit and had been trusted, and on his giving security to pay his debts so owed in the shape of a deed of trust on his interest in this and other lands the trustee had sold said interest in said land at public auction for cash.

There is a strong contrast between the care and diligence of the plaintiff in protecting his rights and that of the defendants. Before they extended credit to the plaintiff's brother, and took this deed of trust of him, they had the clerk's records in the County Court of Braxton, where his brother lived, examined to ascertain what lands he owned, and what liens were upon them; and all they now ask is, that as they have used every precaution in conducting their business, the court will not deprive them of the security they took by setting up an equitable title of the plaintiff, of which they had no actual notice and of which the plaintiff must have in the nature of things known, that they could take no notice. They were wholesale merchants living remote from Braxton county in Charleston. The defendant John H. Frame was engaged in mercantile business in the county of Braxton, and his brother, (the plaintiff) who lived near him, must have known, that in conducting such business he would buy his goods of wholesale merchants at a distance

and thus incur debts, and such creditors would have no means of knowing his pecuniary condition, except as it was shown by the records in the office of the clerk of the County Court. So by his neglect in bringing the suit, the plaintiff must have known he was furnishing his brother John H. Frame the means of imposing on the wholesale merchants, of whom he was buying his goods on credit, as to his pecuniary condition. Just what might have been expected, did occur, and loss must now be sustained. Should this loss be sustained by the plaintiff, who was so grossly careless, or by the defendants, who acted with caution and diligence? *Vigilantibus non dormientibus jura subveniunt.*

But the staleness of the plaintiff's claim is not the only difficulty in making out his case, as presented by the record. I have heretofore assumed, that he proved the verbal gift of this 100 acres of land from his father in 1856. But has he proven the agreement to make this gift with the requisite degree of certainty and distinctness, such as a court of equity should require, especially when it is borne in mind that the plaintiff, who alleges this verbal agreement, asks to have it specifically enforced to the obvious loss of purchasers from his brother for valuable consideration without any actual notice of such verbal gift? The bill alleges, that the plaintiff lived with his father and worked and assisted him on his farm until his marriage, which occurred on May 1, 1855; that his father at that was the owner of seven or eight different tracts of land in Braxton county, W. Va., and being desirous of compensating the plaintiff for his services and starting him in life, proposed to him, that, if he would go upon a certain tract of land, situated on the south side of Elk river, about one mile above Frame's mill in said county, containing 100 acres, and cultivate and improve the same, he would give said land to him and make him deed therefor; that the plaintiff accepted this proposition and on or about May 12, 1855, moved upon said land, and has since held and claimed the same adversely to all the world, that this possession has been open, notorious, and exclusive from that day to this,—a period of over thirty two years; that "some years after the plaintiff moved on this land,—in the month of May, 1868,—being apprehensive,

that he might be made liable by reason of his suretyship of a constable named Wilson because of a fault he determined to convey all of his said land to his two sons, the defendants Thomas J. and John H. Frame. He made them a deed, duly recorded, a copy of which is filed with the bill. On the face of the deed the consideration purports to be \$500.00 cash. This verbal agreement by the plaintiff's father to give him this tract of land was not an absolute promise to give him the land, and make him a deed therefor but was only a conditional promise, that he would do so, if the plaintiff (his son) would cultivate and improve the same. In what way he was required to improve the same is not stated in the bill, if it was specified by the father at the time. But, as the bill states that "the plaintiff (the son) accepted the proposition, moved upon the land, erected a house thereon, and commenced to cultivate and improve the same," it is very probable, that the building of a dwelling-house on this farm, as a residence for his son and his family, he having married, was an improvement required of the son by the father. This is the more probable as we may infer from the proof in the case, that the house then on the land was a very indifferent one, in fact, one not fit to be occupied by his son's family as their dwelling. But even this very indifferent house was then occupied by a woman, who might not surrender the possession of it. There is no direct proof as to the character of this house, that was on the land, but the plaintiff's son proves, that about a year before this suit was brought his father (the plaintiff) offered to sell to T. A. Reip the house and garden at \$50.00, and his brother John said his father should have taken less than he asked for it. We may, I think, fairly infer from this, that the house was hardly fit for a man and his family to occupy. The plaintiff testified that he built a house on this land. But I assume it was a very poor house, as he continued to live in a house worth less than \$50.00. When he built this house does not appear. It only appears, that the son (the plaintiff) moved into the house on the place, when the gift was made by the father. This, the proof shows, was not at the time he was married, on May 1, 1855. There is nothing said about his marriage in the evidence. If the agreement was, that the father would

make the deed to the plaintiff the son, if he would build a residence on the farm and improve it, as the bill says, such an agreement was a conditional agreement.

The building of the residence and improving the farm being a condition precedent to the son's acquiring a right to demand a deed of the father, and if a time was named when the house was to be built, if the son failed to build the house in the specified time or of the character named, he lost forever a right to demand a deed of the father. *Keffer v. Grayson*, 76 Va. 517. Some twelve years after this parol agreement to make a gift on certain conditions to his son (the plaintiff,) the father actually conveyed this land to two sons. "Why he did so," the bill says, "the plaintiff is not advised. Certain it is that it was never intended by his father or his brothers to deprive him of the ownership or possession of this tract of land." It seems to me, a probable explanation of the conduct of the father and brothers to the plaintiff is, that, he having failed to comply with the condition on which only the father was to convey to him the land, that is, as I surmise, to build in a certain specified time a house of a particular character, he had no right to demand a deed of his father, and his father was at liberty to convey it to his other sons; and this he did because of the failure of the plaintiff to comply with the condition imposed on him by his father, the plaintiff and his family after twelve years still living in a house worth less than \$50.00.

The answer of the defendants to the appellee's bill denied this verbal gift by the father to his son (the plaintiff) of this land. This put on him the burden of proving this parol agreement of his father to give him this land; and the law, we have seen, required him to prove the agreement with definiteness and accuracy. Has this been done? It seems to me, it has not. No one, who was present, when the alleged verbal agreement was entered into by the father and son, testifies in the case to what then transpired, or as to the terms of or conditions attached to the gift. That it was a conditional agreement we learn only from the allegations in the bill. There is not one particle of evidence showing what the terms or conditions of the gift were. The whole proof consists of subsequent admission by the father, that

he had given this land to his son (the plaintiff) or admission by conduct or by acts that he regarded this farm as belonging to his son (the plaintiff.) But such statements and conduct are what would naturally have occurred, had the verbal gift of this farm to his son (the plaintiff) been a conditional one, such as is set out in the bill, or such as I have above suggested. Naturally, the father would have expected the condition precedent attached to the gift would in good time be complied with by the son, and the gift thus perfected; and anticipating that this would be the case the father would naturally speak and act as if this farm belonged to his son, though he had no right to demand a deed for this farm, unless he complied strictly with the conditions precedent to the gift, whatever they were.

The most direct and satisfactory evidence of this verbal agreement was the deposition of a nephew of the father, giving what was said casually by the father to the witness the day after this verbal gift of this farm to his son, (the plaintiff.) This we will analyze. He says in his deposition taken October 17, 1887: "L. M. Frame, the plaintiff, has resided on this farm of 100 acres about thirty one years. I went to his father's, William B. Frame's, one morning, and he said to me: 'I have made way with my land.' I said, 'Have you?' and he said, 'Yes. I gave Lemuel a farm yesterday,'—and he pointed to the 100 acre farm across the river as the one he had given him. He said he let John and Tom have the balance. He had owned six or seven tracts of land. He said: 'Now Lemuel can go to work, or starve.' He said too, they would have to give Nancy Jones, to get her out of the house, two bushels of corn, before Lem could move in."

Though this witness is so definite as to what was said then, still it is obvious, that his testimony is far from being satisfactory. It gives the details of a casual conversation, in which the witness had no interest, and which occurred some thirty one years before. We know there must have been very substantial errors in it. For instance, the bill does not pretend, that William B. Frame gave all his land to his three sons at that time, in 1856; but it says he gave this one farm of 100 acres to his son (the plaintiff) then and the bal-

ance of his land to his two other sons, John and Thomas, some twelve years afterwards; and not one member of the family or a single other witness ever heard of any gift at that time of any of his lands by William B. Frame to any of his children except this 100 acres to his son, the plaintiff. This, I suppose, was a mistake made by the nephew as to what his uncle, William B. Frame, then said to him. He heard this many years afterwards. This witness said, that the father said, "Now Lemuel," (the plaintiff,) "must go to work." This does not look as if the gift was made, as stated in the bill, "to compensate the plaintiff for his past services and to start him in life." He had lived with his father, but we may infer from what his father said, that he did not think his past services deserved compensation, but rather considered, that he had heretofore supported him in idleness, and he proposed to do so no longer, but he must "go to work or starve."

There is in this conversation corroborative evidence of the small value of the house on this 100 acres of land; for it is supposed, Nancy Jones would let the son move into this house, and she would give it up for the trifling compensation of two bushels of corn. She could not have regarded the house at all desirable to live in, if she could surrender it so easily.

This conversation took place before the son (the plaintiff) had taken possession of this farm, and when of course the conditional gift named in the bill was imperfect, and when of course the son had no right to demand a deed of the father; and, though the statements and acts of the father subsequently show simply, that he had given his son (the plaintiff) this farm, and were made, after he had taken possession, yet none of them are inconsistent with the gift being conditional and the condition not complied with; and this, one suspects, was the case, from the fact that the father some twelve years afterwards made to two other sons a deed for this farm. It seems to me, therefore, that the plaintiff has failed to show with the requisite degree of distinctness and accuracy the terms of the verbal agreement made by his father giving him this land because of the great lapse of time (thirty one years) before the institution of this suit.

The court below ought to have dismissed the plaintiff's bill at his costs. The court below obviously by its order made December 5, 1887, properly dismissed the bill as to the defendant, Thomas J. Frame, he tendering with his answer a deed to the plaintiff for his moiety of the land, which the plaintiff was willing to accept; but the court below erred in its decree of May 2, 1888, specifically enforcing said alleged verbal contract against the other defendants.

This decree must be set aside, annulled and reversed, and the appellants must recover of the appellee, L. M. Frame, their costs in this Court expended; and this Court entering such order, as the court below should have entered, must dismiss the bill of the plaintiff; and the defendants below other than Thomas J. Frame must recover of the plaintiff below their costs expended in the court below.

REVERSED.

WHEELING.

GWYNN v. SCHWARTZ.

*(ENGLISH, JUDGE, absent.)

Submitted January 25, 1889.—Decided June 26, 1889.

1. NEW TRIAL—WRIT OF ERROR.

When in any civil suit there is an order made granting a new trial, a writ of error will lie from such order, either before or after the new trial has been had, and without regard to the finding on such new trial. (p. 494.)

2. NEW TRIAL.

The verdict of a jury ought not to be interfered with, and a new trial awarded by the court, when the evidence is contradictory, if, when most favorably considered in support of the verdict, it does not still appear, that the verdict was plainly not warranted by the evidence. (p. 494.)

3. BOUNDARIES—COURSES AND DISTANCES.

In the description of lands as to questions of boundaries the rule is settled in Virginia and West Virginia, that natural landmarks, marked lines and reputed boundaries will control mere

*On account of illness.

32	487
35	584
32	487
38	16
32	487
46	150
32	487
47	126
32	487
49	553
32	487
55	253
55	600
32	487
56	131
57	606

32	487
59	124
59	129
32	487
e61	305

32	487
e62	50
62	590
f62	591
f63	450

32	487
f64	579
65	206

courses and distances or mistaken descriptions in surveys and conveyances. (p. 496.)

4. BOUNDARIES—QUANTITY OF LAND.

The statement of the quantity of land supposed to be conveyed, and inserted in deeds by way of description, must not only yield to natural landmarks and marked lines, but also to descriptions in deeds by courses and distances. (p. 497.)

5. BOUNDARIES—COURSES AND DISTANCES.

Disputed boundaries between two adjoining lands may be settled by express oral agreement, executed immediately and accompanied by possession according thereto. (p. 500.)

6. BOUNDARIES—EVIDENCE.

Long acquiescence by one adjoining proprietor in a boundary established by the other is evidence of such agreement so fixing the division-line between them. (p. 500.)

7. BOUNDARIES—EVIDENCE.

Such acquiescence may be shown by the adjoining land-owners having actual possession and cultivating to such line ; or, if the line run through woods, by the proprietor, who established such division-line, with the knowledge of the adjoining land-proprietor always clearing up to this line and, with his like knowledge cutting timber and peeling bark up to this division, the other land-owner making no objection to such claim or such acts of ownership, though he was present when such acts were being done. (p. 502.)

8. BOUNDARIES—EVIDENCE—NEW TRIAL.

Such acquiescence, in this State for a period of over ten years will justify a jury in inferring, that such parol agreement establishing such division-line existed ; and a verdict based on such inference ought not to be set aside as plainly contrary to the evidence. (p. 503.)

Statement of the case by GREEN, JUDGE :

This is an action of ejectment brought August, 1884, in the Circuit Court of Mason. The declaration was in proper form, and to it the defendant pleaded not guilty, on which issue was joined. There was no controversy in the court below, nor is there any in this Court about the pleadings. When the case was tried first, the jury on February 10, 1886, found : "We, the jury, find the defendant not guilty," and thereupon the plaintiff, Amos Gwynn, moved the court to set aside the verdict and award him a new trial, because the same was contrary to the law and the evidence, which

motion the court sustained, on condition the plaintiff pay unto the defendant his costs expended in the trial of the cause at that term of the court; and the defendant took a bill of exceptions to this action of the court, in which all the evidence before the jury and all the proceedings had in the trial of the case are set out. No instructions were asked by either party. The whole controversy was as to the proper location of the division-line separating the farms of the plaintiff and the defendant.

The evidence shows, that one D. C. Sayre owned a tract of land of 7,000 acres on Little Mill creek in Mason county. On August 8, 1856, he gave to his two grandchildren, Daniel W. Vanmetre and Miriam McCullough, about 400 acres, as he supposed, dividing it into two nearly equal parts. He conveyed one of these to Daniel W. Vanmetre, and on the same day he conveyed the other part to Joshua McCullough. March 3, 1880, Daniel W. Vanmetre and wife conveyed the land so conveyed to him to the plaintiff, Amos Gwynn, by a deed, which was duly admitted to record. Joshua S. McCullough conveyed the land so conveyed to him to Henry J. Sine by a deed dated December 12, 1866, duly recorded; and Henry J. Sine and wife by deed duly recorded conveyed said land to the defendant, Levi Schwartz. The whole controversy in this case is in reference to the true division line between these two tracts of land.

On reading these two deeds one is struck with some peculiarities in them. Though they were both deeds of gift, yet on the face of the deeds they appear to be sales; for the consideration named in each of them is \$300.00 cash, and both of them contain general warranties of title. In the next place, while each deed states, that the land conveyed is "about two hundred acres," yet it is perfectly obvious according to the metes and bounds, that the land conveyed to Joshua S. McCullough now owned by the defendant, Schwartz, contained ten or twelve acres more than the land conveyed to Vanmetre now owned by the plaintiff. The two tracts are of the same shape, (parallelogram,) 310 poles long, one being 106 poles wide, and the other 100 poles wide. Again, it would seem from these deeds, that the division-line between the two tracts—the subject of dispute

now—was not actually run, when the deeds were made. The deed to McCullough gives the length as 310 poles, while the deed to Vanmetre gives the length as 300 poles. In fact, the inference to be drawn from the reading of these deeds is, that very few, if any, of the metes and bounds of these two parcels of land were then actually run, as no corners are stated to have been made or marked. The courses of the tract in the deed to McCullough are as follows: "Beginning at the lower corner of a tract sold to Miriam Sayre in Little Mill creek bottom, and running with said line west three hundred and ten poles to the closing line of the 7,000 acre tract, and with said line north eighteen degrees west, one hundred and six poles; thence east three hundred and ten poles to the centre of Little Mill creek, thence up the same with its meanders to the beginning." While the courses of the Vanmetre tract are thus given in his deed: "Beginning at the lower corner of a tract sold to Joshua McCullough in Little Mill creek, and running with said McCullough's line west three hundred poles to the closing line of the 7,000 acre tract, thence with said line north, eighteen degrees west, one hundred poles, thence east three hundred poles to the middle of Little Mill creek, thence up the same with its meanders to the beginning."

The surveyor, in his report made to the court in this case, states, that the parties to this suit—plaintiff and defendant—point out to him a birch on Little Mill creek, which they agreed was the lower corner of the tract sold to Miriam Sayre in "Little Mill creek bottom" and therefore the beginning corner of the defendant's (Schwartz's) tract of land. The surveyor then ran a line nearly west—that is, N. 88 deg. 40 min. W.—along what was said by the said parties to be a line of the Miriam Sayre tract, till it intersects the closing line of the 7,000 acre tract of Daniel C. Sayre at a hickory marked as a corner, which it was agreed by the said parties was the second corner of the defendant's (Schwartz's) tract of land.

If there had been no parol evidence in this case, as neither of the deeds giving the boundaries of the tract of land owned by the defendant, Schwartz, or by the plaintiff, Gwynn, give any marked corners but only the metes and distances of each

tract, all that could be done to ascertain the boundaries of these tracts of land and the true division-line between them would have been to run out these two tracts of land according to the courses and distances contained in the deeds. The true division-line between these tracts would then have been S. 88 deg., 40 min. E., so as to be parallel with the first line of the tract conveyed to McCullough; for though this line was said in the deed to run west, yet it did not run quite west but N. 88 deg., 40 min. W., and it is therefore to be supposed that the division-line between these two tracts, stated in the deed to run east, really ran S. 88 deg., 40 min. E. or parallel with the first line. The division-line described in one of these deeds as 300 poles and the other 310, would according to both deeds terminate at Little Mill creek.

The plaintiff insists, that the division-line between the tracts of the plaintiff and defendant must be found by so running out the courses and distances of the deed, under which he and defendant claim. This, if done, would show the verdict of the jury in favor of the plaintiff to be correct, and the judgment of the court below, of September 15, 1886, would be affirmed. The defendant however insists, that there was before the jury abundant evidence to justify the verdict of the jury on the first trial for the defendant, and that the court ought then to have entered up a judgment for the defendant instead of granting on the motion of the plaintiff a new trial, as it did on February 20, 1886. All the evidence given at this trial is certified by the court; and in deciding, whether the Circuit Court erred in awarding such new trial, we are bound to give full weight to the defendant's evidence; and, when the evidence in favor of the plaintiff conflicts with that of the defendant, we must reject the plaintiff's evidence.

When the evidence is thus viewed, we may regard this as the case as proven by the evidence in the estimation of the jury: that D. C. Sayre, before he executed to his grandchildren said two deeds dated August 8, 1856, under which the plaintiff and defendant respectively claim, marked as a corner of the division-line between the said two tracts of land a hickory on the closing line of the 7,000 acre tract, and that said hickory is on the division-line between these two tracts of land, as is claimed by the defendant; that D. C.

Sayre, before he made these two deeds of August 8, 1856, also marked the trees on each side of a road, where it crossed this division line between these two tracts; that these trees were marked as a corner and as line trees on this division-line between these two tracts afterwards deeded by Sayre, when a survey of this 7,000 acre tract was being made; that when the distance was run, showing the width of the tract according to the deeds, he intended making, he made the surveyor stop, set his compass on this division-line, as he intended it should be, and mark these trees as upon it; that these trees are on the division-line of these tracts as claimed by the defendant; that D. W. Vanmetre, under whom the plaintiff claims, went with a certain person to look at this land which had been deeded to him by D. C. Sayre, Rollins having an idea of purchasing it; that one Shirley pointed out to them one of these marked trees on this road as the division-line between the tracts of plaintiff and defendant, and that from this tree they had traced this division-line its whole length by well-marked trees; that the line thus recognized by the vendor of the plaintiff as the division-line is the line now claimed by the defendant as the true division-line; that it had been run and marked by a surveyor named Rollins, who was employed by A. R. Sayre, who was a son of D. C. Sayre, under whose two deeds of August 8, 1856, both plaintiff and defendant in this suit claim; that in running this division-line he was guided by a plat furnished by D. C. Sayre, who was a surveyor; and these trees, which I have spoken of as marked by him as on the intended division between these two tracts, which he had marked before he made the deeds of August 8, 1856, were noted in this plat as on this division-line; and that this surveyor, Rollins, so ran the division-line as to make these trees stand upon it, though in so doing the line was not straight; that this division-line as so run by Rollins is still found distinctly marked and is far from being a straight line; that there are now found still standing and well marked no less than thirty eight trees along this division-line so run and marked by Rollins in 1870; that the line as shown by these marked trees is so crooked, that it would be difficult to suppose, it was ever run by a surveyor for a straight line. Some of these trees are

north of where they should be, if the line was straight, and others are south, and distant from the straight line from four links to as much as ninety links; that the defendant always claimed this line, as run and marked by Rollins in 1870, as the division-line between him and the tract owned by the plaintiff; that he and those, under whom he claimed always cut wood and lumber up to this line; that Vanmetre, the plaintiff's vendor, knew of this line and made no objection to his doing so; that Vanmetre was frequently there, when the defendant's vendor was cutting timber and hauling tan-bark up to these trees as marked by Rollins as on his division-line between them; that Vanmetre knew, that those, under whom the defendant claimed, held, that this line as run by Rollins was the division-line, for they had warned Vanmetre not to cut beyond this line; and they cut up to it without any objection from Vanmetre; that the land lying between this crooked division-line run by Rollins in 1870 and the line run by courses and distances in the two deeds from D. C. Sayre of August 8, 1856, under which the plaintiff and defendant claim, is the land in controversy in this suit; that it contains twenty acres and is in woods; while the defendant and those, under whom he claims, by cutting timber and peeling bark up to this Rollins line, ever since it was run up to the institution of this suit, was getting the use of this land in controversy; and yet the defendant and those, under whom he claims never did have actual possession of the land in controversy for a longer period than eight years.

If the views of the plaintiff are followed, his tract would contain $272\frac{1}{2}$ acres instead of about 200 acres, as called for by his deed; but, if the views of the defendant are followed, and this Rollins line is held to be the division-line, the tract of the plaintiff will contain 250 acres, and the tract of the defendant $229\frac{1}{2}$ acres.

J. B. Menager and Simpson & Howard for plaintiff in error.

Gunn & Gibbons for defendant in error.

GREEN, JUDGE:

The only question in this case is whether the court below

in its judgment rendered on February 20, 1886, erred in setting aside the verdict of the jury in favor of the defendant as contrary to the law and the evidence, and in awarding a new trial. A writ of error may be granted to such judgment, without reference to the final judgment in the case, and even without waiting for the new trial to be had. See Code 1887, c. 135, § 1, par. 9. A bill of exceptions was taken by the defendant to this action of the court, and in it the court certified all the evidence. The only question in controversy before the jury was the true location of the division-line between a tract of land owned by the plaintiff and a tract owned by the defendant, the plaintiff complaining, that the defendant had encroached on his tract of land by taking possession of about twenty acres, which he insisted, if the division-line between them was correctly located, was a part of his tract. The question in controversy was therefore much more a question of fact than of law. It has always been regarded in Virginia and in this state as a delicate matter for a court to interfere with the verdict of a jury on a question of fact. The jury is the judge of the weight and credit to be attached to the evidence; and it is only in cases of manifest abuse or plain departure from right and justice, that the court can interfere with the finding of a jury in such matters by granting a new trial. See *Ross v. Gill*, 1 Wash. (Va.) 88; *McDowell's Ex'r v. Crawford*, 11 Gratt. 377; *State v. Hurst*, 11 W. Va. 75; *State v. Thompson*, 21 W. Va. 756; *Black v. Thomas*, Id. 712; *Blosser v. Harshbarger*, 21 Gratt. 216; *Grayson's Case*, 6 Gratt. 712; *Sheff v. City of Huntington*, 16 W. Va. 307.

These cases show that the verdict of the jury ought not to be interfered with, and a new trial awarded, when the evidence is contradictory, and when most favorably considered in support of the verdict of the jury it does not appear, that the verdict was plainly not warranted by the facts proven. I have stated however the facts in this case, as shown by the record. Does it plainly appear from these facts proven, that the verdict of the jury in favor of the defendant was unwarranted by these facts?

The jury in finding a verdict for the defendant must have regarded it as a fair inference from the facts proven that,

the line run and marked by Rollins in 1870 was the division-line between the tracts of the plaintiff and the defendant. If this were an inference which can be drawn from the facts proven, then the verdict of the jury could not be properly set aside by this court. The counsel for the plaintiff claims, that this Rollins line already run and marked as the division-line between these two tracts could not have been the true division-line because the true division-line according to the deeds was a line running east and west, and parallel with the base line, but the line run by Rollins 1870 varied from a parallel with the base line by 2 deg., 15 min., which in the length of the division-line would make a variation of fourteen poles. Then, again, this division-line as run by Rollins would make the width of the defendant's tract 109 poles instead of 106 poles, as called for by the deeds. The land contained in the defendant's tract, if this Rollins division-line be regarded as the true line, would be 250 acres instead of about 200 called for in the deeds, and lost by this Rollins line, which though well marked is far from a straight line, as called for by the deeds; on the contrary some of the marked trees along this Rollins line are nearly twenty yards from where they would be, if the line had been run straight; and, lastly, this Rollins division-line was not run by Daniel C. Sayre, when on August 8, 1856, he conveyed to his grandchildren, under whom the parties to this suit claim, these two tracts of land, but some fourteen years after these two deeds were made, and it was then a line run at the instance of a party, under whom defendant claims. This is true; but it was proven, that, before these two deeds, under which the plaintiff and defendant respectively claim, made August 8, 1856, the common grantor, Daniel C. Sayre, had actually marked several trees on this division-line, as afterwards run by Rollins, as trees, which should be on the division-line between the two tracts he was going to convey to his grandchildren; and, when Rollins years afterwards ran this division-line, he was guided in running it by a plat of these two tracts furnished by Daniel C. Sayre, the common grantor of each of them originally, on which plat these trees were marked along the division-line between the two

tracts; and, this being the case, the jury might have regarded the division-line as in part run prior to the making of the two deeds by Daniel C. Sayre in 1856, and not altogether by Rollins in 1870 for the first time.

We will now consider the objections, which are urged by the plaintiff's counsel against this line as run by Rollins being regarded as the division-line between the tracts of the plaintiff and of the defendant; and first as to the departure of this line in course and distance from the division-line as called for by the deeds. The variation in course is 2 deg., 15 min., and the Rollins line exceeds in the length the division called for in the deeds not less than fifty three poles. In the description of lands or question of boundaries the rule is settled in Virginia and in this State, that natural lines and reputed boundaries will control mere courses and mere courses and distances or mistaken description in surveys and conveyances. See *Dogan v. Seekright*, 4 Hen. & M. 125; *Coles v. Wooding*, 2 Pat. & H. 189; *Baker v. Seekright*, 1 Hen. & M. 177; *Smith v. Davis*, 4 Gratt. 50; *Adams v. Alkire*, 20 W. Va. 486. See, also, *Cherry v. Slade's Adm'r*, 3 Murph. 82.

If then this Rollins division-line be proven to be the marked division-line between the tracts of the plaintiff and defendant, it must be held to be the true line though it differs in its courses and distances from the division-line called for in the deeds. It is a crooked line, portions of it being nearly twenty yards from where it would be if it were a straight line between its extremities. See *Cowen v. Fauntleroy*, 2 Bibb 261.

We have less difficulty in disregarding to a considerable extent the courses and distances of this division-line as named in the deed, because it is apparent, that, as stated in the deed, the distance as well as the course was to a considerable extent a surmise and can not be relied upon. Thus in the deed from Daniel C. Sayre to David Vanmetre dated August 8, 1856, the length of this division-line is stated to be 300 poles; but in a deed of the same date from Daniel C. Sayre to Joshua McCullough, under which the defendant claims, this division by all the deeds is the middle of Little Mill creek, and the other terminus is the closing line of the 7,000 acre tract. Now the survey made in this case under the order of

the court shows, that the shortest line, which could be run between these two termini, would exceed 350 poles in length, or exceed the distance called for in the deeds from forty to fifty poles; nor can the course of this division-line as called for in the deeds be regarded as correct, for it is called an east and west line in all these deeds, and yet they speak of it as parallel to the division-line between this tract of the defendant and another tract of McCullough. Its true location was admitted by both the plaintiff and defendant in this suit; but instead of being an east and west line as called for in the deeds, it varied 1 deg., 19 min., its real course being N. 88 deg., 40 min. W. The fact, that, if this Rollins division line is adopted, it would make the defendant's tract contain 250 acres and the plaintiff's tract only 239½ acres, while the deeds call for each of them as containing 200 acres more or less, is entitled to very little consideration in determining the location of this division-line; for the general rule is, that a statement of the quantity of land supposed to be conveyed, when inserted by way of description only, must yield to description by metes and marked boundaries. See *Bradford v. Hill*, 1 Hayw. (N. C.) 22 and note; *Drew v. Swift*, 46 N. Y. 204; *Powell v. Clarke* 5 Mass. 355.

In the case before us this variation in the quantity of the land from that called for in the deeds is entitled to much less consideration than it would ordinarily be entitled to in fixing the division-line between the two tracts, for, though both of these tracts of the plaintiff and of the defendant are said in the deeds to contain about 200 acres, yet it is obvious from the face of the deeds that the tract of the defendant was the larger of the two, for it is of the same shape with that of the plaintiff,—oblique parallelograms, of the same length east and west,—while the defendant's tract was in width north and south 106 poles, and the plaintiff's tract was only 100 poles wide; and, as the two tracts contained together 479½ acres instead of 400 acres, as called for by the deeds, we would naturally expect the defendant's tract to exceed 200 acres considerably. If the boundary between the two tracts be fixed as claimed by the plaintiff, the defendant's tract will contain only 207½ acres, while the plaintiff's will contain 272 acres, a result obviously much

more in conflict with the face of the deeds than is caused by taking the Rollins line as the division-line between the tracts.

It only remains to inquire, whether there was before the jury evidence, from which they could draw the inference, that the line as run by Rollins was the true division-line between the two tracts. These two tracts, one claimed by the plaintiff and the other by the defendant, had their origin in two deeds made by Daniel C. Sayre to his grandchildren on August 8, 1856. The plaintiff claims under one of these grantees, D. W. Vanmatre, and the defendant under the other, Joshua McCullough. There is evidence, from which the jury might conclude, that one of the termini of this division was fixed by Daniel C. Sayre, and a tree marked as such, before he made these deeds, and also two trees, where this division-line crossed a certain road, were also marked as trees on this division-line before Daniel C. Sayre made these deeds. But this division-line was not actually run and marked as such, before or when these deeds of August 8, 1856, were made, further than the marking of these three trees on them.

Some fourteen years after these deeds were made, at the instance of one, under whom the defendant claims, Rollins, a surveyor, ran and marked this division-line. In so doing he was guided by a plat of these tracts of land purchased by Daniel C. Sayre, the common grantor of them, who was a surveyor, and who had on this plat marked the trees which, before he made said deeds, he had marked as on this division-line. The surveyor, Rollins, so ran the division-line, that all these marked trees should be upon it. In so doing he departed considerably from the courses and distances named in the deeds. He marked forty or fifty trees upon the division-line thus run, most of which are still standing. Those, under whom the defendant claims, and the defendant, have ever since for a period not less than fourteen years before the institution of this suit claimed this as the division-line between these tracts; and this claim is set up by the defendant and those, under whom he claims. The defendant's claim was shown by his cutting timber and stripping bark off from trees up to this division-line as run by Rollins,

the person owning the other tract being frequently present, when this was being done, and making no objections thereto, though he well knew the location of this division-line as claimed by those, under whom the defendant claimed. It had been pointed out to him, and he had been warned not to cut timber beyond this division-line as run by Rollins; and on one occasion the party, under whom the plaintiff claims went along the Rollins division-line and pointed it out to a person, who was thinking of purchasing his land, as the boundary of it; and some seven years after this line was run by Rollins, the defendant moved onto his tract of land and cleared a part of it up to this Rollins line, and the plaintiff and those, under whom he claimed, made no objection to his doing so or to his cutting timber up to it. Before the plaintiff purchased his tract of land of Vanmetre, he was shown one of the marked trees on this Rollins division-line and was told, that it was on the division-line between the two tracts; and that, ever since the plaintiff bought in 1880 of Vanmetre this tract, the defendant had claimed this Rollins line as the division-line between the tracts, and had continued to cut timber off from it and to grub up to it without objection on the part of the defendant.

Can we on this character of evidence say, that the jury inferring from it and deciding, as they did at the first trial, that this Rollins line was the division-line between the tracts of the plaintiff and the defendant, so plainly erred, that the court ought to have set aside their verdict and awarded a new trial, as it did? It seems to me, that the inference to be drawn from such evidence was an inference of fact and not a conclusion of law. It was therefore peculiarly the duty of the jury to draw the inference, and not that of the court; and the inference drawn by the jury was not so clearly erroneous as to justify the court in interfering with the verdict.

Whatever doubt may exist as to whether this Rollins division was originally the division-line between these two tracts, as established by Daniel C. Sayre in 1856, when he formed and conveyed these two tracts, we think, the evidence justifies the conclusion that not less than fourteen years before the institution of this suit, this Rollins division-line was

run by a surveyor at the instance of one, under whom the defendant claims; that Vanmetre, under whom the plaintiff claims, knew, that this division-line had been so run; and, though he had nothing to do with the running of the line, he was cognizant of its having been so run, and that the defendant and those, under whom he claimed, regarded it as establishing the boundary between the two tracts, and the said Vanmetre and the plaintiff acquiesced in this Rollins line as the established division-line between the two tracts for some fourteen years before the institution of this suit, permitting the defendant and those, under whom he claimed, to clear up to this line in places, and in other places to cut timber up to the line without objection.

It may be regarded as settled, that a disputed boundary between two adjoining proprietors may be settled by parol agreement, when the agreement is accompanied by possession according thereto. See *Jackson v. Dysling*, 2 Caines, 198; *Kip v. Norton*, 12 Wend. 127; *Terry v. Chandler*, 16 N. Y. 354; *Vosburg v. Teator*, 32 N. Y. 568; *Smith v. Hamilton*, 20 Mich. 433; *McNamara v. Seaton*, 82 Ill. 498-500. Such parol agreement is not regarded as passing any real estate from one proprietor to the other but as simply ascertaining the line, to which their respective deeds extend; and hence it follows, that long acquiescence by one of adjoining proprietors in a boundary as established by the other is evidence of an agreement, that such is the boundary. *Kip v. Norton*, 12 Wend. 127. What is meant by long acquiescence in this proposition is not definitely settled by the decisions. Thus in *Sneed v. Osborn*, 25 Cal. 626, Judge RHODES, delivering the opinion of the court, says: "The authorities are abundant to the point that, when the owners of adjoining lands have acquiesced for a considerable time in the location of a division-line between their lands, although it may not be the true line according to the calls of their deeds, they are thereafter precluded from saying it is not the true line. The better opinion is that the considerable time mentioned in the cases must, at least, equal the length of time prescribed by the statute of limitations to bar a right of entry. See *Jackson v. Ogden*, 7 Johns, 238; *Jackson v. Freer*, 17 Johns 29; *McCormick v. Barnum*, 10

Wend. 104; *Dibble v. Rogers*, 13 Wend. 536; *Adams v. Rockwell*, 16 Wend. 285; *Van Wyck v. Wright*, 18 Wend. 157; *Boyd's Lessee v. Graves*, 4 Wheat, 513.

But in *Kellogg v. Smith*, 7 Cush. 375, the court admits the difficulty of reducing the cases to system and consistency, and limits itself to deciding, that long acquiescence may give validity to such transactions, even if they do not possess it in the first instance. FLETCHER, J., in delivering the opinion of the court, says, (page 379:) "It seems to be settled by a course of decisions of the Supreme Court of New York, that, where the owners of adjoining lots of land settle and establish a division-line between them by express parol agreement, and their agreement is immediately executed and is accompanied and followed by actual possession according to such line, the agreement is binding and conclusive, and such division-line shall not be disturbed, though it may afterwarde appear, that it is not the true line according to the paper title; so, when no express agreement is shown, long acquiescence by one proprietor in the line assumed by the other is evidence, from which such agreement may be inferred. *Jackson v. Bowen*, 1 Caines, 358-362; *Jackson v. Dysling*, 2 Caines, 198, 201; *Jackson v. Vedder*, 3 Johns, 8, 12; *Jackson v. Dieffendorf*, Id. 269; *Jackson v. Ogden*, 7 Johns. 238-242; *Jackson v. Douglas*, 8 Johns. 286; *Jackson v. Gardner*, Id. 308; *Jackson v. Smith*, 9 Johns. 100; *Jackson v. McCall*, 10 Johns. 377, 380; *Jackson v. Van Corlaer*, 11 Johns, 123; *Jackson v. Freer*, 17 Johns. 29; *Rockwell v. Adams*, 7 Cow. 761, 6 Wend. 467; *McCormick v. Barnum*, 10 Wend. 104; *Dibble v. Rogers*, 13 Wend. 536. In most of these cases there had been a possession of more than twenty years according to the line, but in several of them the possession had been for a less time than twenty years, there being no sufficient adverse possession to make a title, the decision depending on the force of the parol agreement, and the occupancy according to such agreement. No particular time appears to have been settled as necessary, during which such occupancy should have continued, and the length of the time of the occupancy was different in the different cases. The decisions in the cases referred to above were not over-

ruled by the court of errors in *Adams v. Rockwell*, 16 Wend. 286."

Since this decision rendered in 1851 the decisions have not reached any clear or distinct conclusion with reference to the controverted point as to the length of time, which must elapse, before an agreement fixing a division-line can be inferred from an acquiescence therein. Thus, in *McNamara v. Seaton*, 82 Ill. 500, (decided by the Supreme Court of Illinois in 1876,) the court say: "It has been held, and the rule may be regarded as well settled, not only here, but in other states, that where adjoining land-owners agree upon a boundary line, and enter into possession, and improve the land, according to the line thus agreed upon, the parties will be precluded from afterwards disputing that the line then agreed upon is the true one, even where the statute of limitations has not run. *Crowell v. Maughs*, 2 Gilman, 419; *Bauer v. Gottmanhausen*, 65 Ill. 499; *Yates v. Shaw*, 24 Ill. 367." But, as not according with these views, see *Carleton v. Reddington*, 1 Fost. N. H. 291; *Tolman v. Sparhawk*, 5 Metc. 469; *Brewer v. Railroad Corp.*, Id. 478.

Nor do the decisions indicate in what way acquiescence by one adjoining proprietor in a division-line fixed by another adjoining proprietor is to be proven. It is clear, that one mode of proving this acquiescence is by the actual occupation and cultivation up to such line so fixed without objection by the other adjoining proprietor. But this is not the only mode, in which this acquiescence can be shown. If it was, all these decisions, in which it has been held, that the acquiescence, to avail a party, must be for a period at least as long as that, which bars a right of entry, would be idle; for, if this were so, the party cultivating up to the division-line so fixed would acquire this land up to such a division-line, being presumed to be made by the parties by adversary possession. This acquiescence in a division, which has been fixed and marked can be proven by any evidence, that would satisfy a person, that in point of fact such division had been accepted by both of the adjoining land-owners as the division-line between them: for instance, if such division-line run through a wood, by one party cutting timber to such division-line habitually with the knowledge of the other,

who knowing, that he claims this marked line as a division-line, still makes no objection to such cutting.

Applying this law to the facts in this case, the jury from the evidence had a right to infer, that the defendant and those, under whom he claimed, had from the time, when Rollins run the division-line between the tract of the defendant and plaintiff, which was not later than 1870, up to the institution of this suit claimed this Rollins line as the true division-line, and that he had shown by cutting timber and peeling bark up to this Rollins line for some seven years, and then by clearing the land up to the same line along a part of it, and continuing to cut timber up to that along the residue of the tract, the plaintiff and Vanmetre, under whom he claimed, acquiesced in this Rollins line as the true division-line between the two tracts; for, knowing that the defendant and those, under whom he claimed title, claimed this land up to the Rollins line and cut timber up to it for some fourteen years and cultivated for some seven or eight years portions of the land up to the same line, yet neither Vanmetre, under whom the plaintiff claimed, nor the plaintiff himself objected to this occupancy and use of the land in controversy, and thus treated this Rollins line as the true division-line between the tracts; and that said Vanmetre had been along the whole of this Rollins line and pointed it out to a person, to whom he wished to sell, as the true division-line between the two tracts.

In this state ten years by the statute bars a right of entry on land; so the jury from the evidence might well have found in this case, that the acquiescence of the plaintiff and Vanmetre, under whom he claimed, in this Rollins line as the division-line continued for fourteen years before the institution of this suit, or at least for more than ten years, and therefore by all the decisions, this acquiescence in this Rollins line as the division-line between the two tracts had been sufficiently long to justify the conclusion, that it had been agreed upon by the parties as the true division-line between them.

The jury therefore did not plainly err in the first trial in regarding this Rollins line as the division-line between the tracts of the plaintiff and defendant, and in finding a verdict for the defendant.

The court below therefore erred in its judgment rendered February 20, 1886, in setting aside this verdict and in awarding him a new trial. It should have overruled the motion of the plaintiff to set aside this verdict and award him a new trial, and should have entered up a judgment in favor of the defendant, in accordance with the verdict. Of course it follows, that the judgment of the court below in favor of the plaintiff rendered afterwards September 15, 1888, is erroneous, and both these judgments must be set aside, reversed and annulled; and the plaintiff in error, Louis Schwartz, (the defendant below) must recover of the plaintiff below (the defendant in error), Amos Gynn, his costs in this Court expended; and this Court must enter up such judgment for the defendant below, Louis Schwartz, as the court below should have entered.

REVERSED.

WHEELING.

LEWIS v. ALKIRE.

*(BRANNON, JUDGE, absent.)

Submitted June 11, 1889.—Decided June 27, 1889.

32	504
146	189
32	504
64	885

1. REVERSAL OF DECREE—DEMURRER TO EVIDENCE.

Where a case is tried by the court in lieu of a jury, the appellate court must regard the case as upon a demurrer to the evidence; and it will not reverse the judgment of the trial-court, upon the ground that it is contrary to the evidence, unless after disregarding all the conflicting evidence of the defendant in error there is not sufficient legal evidence in the case to warrant the judgment.

2. REVERSAL OF DECREE &c—TRIAL.

The matter of the order and time of the introduction of evidence is largely in the discretion of the trial-court, and will not be interfered with by the appellate court, where no injustice has been done.

*Rendered judgment below.

W. E. Lively and *L. Bennett* for plaintiffs in error.

T. Hunter for defendant in error.

SNYDER, PRESIDENT :

Action commenced before a justice of Lewis county by J. S. Lewis & Co. against John W. Alkire, J. G. Sims, E. M. Gibson, W. A. Sims and G. W. Allman on a negotiable note dated April 13, 1886, for \$150.00, purporting to be signed by John W. Alkire and J. G. Sims, payable ninety days after date, to the order of E. M. Gibson at the National Exchange Bank of Weston, and indorsed successively by the said E. M. Gibson, G. W. Sims, and G. W. Allman. All the defendants appeared to the action, except E. M. Gibson, who was not served with process; and on the hearing of the case the justice dismissed it as to the defendants J. G. Sims and W. A. Sims, and gave judgment for the plaintiffs against the defendants Alkire and Allman for the amount of said note and costs. From this judgment the said Alkire and Allman appealed to the Circuit Court of Lewis county, where the case was tried by the court in lieu of a jury, and judgment was rendered by it for the plaintiffs affirming the judgment of the justice; and from this latter judgment the said defendants Alkire and Allman have obtained this writ of error.

Neither the transcript from the justice nor the record of the Circuit Court show the ground on which the action was dismissed by the justice as to the defendants J. G. and W. A. Sims; nor does it appear from the pleadings, that any plea or answer was filed by any of the defendants to the action, as is required by Code of 1887, c. 50, s. 50. The bill of exceptions, which certifies all the evidence heard on the trial, shows, that the defendants offered evidence tending to prove, that the names of the maker and all the indorsers of the note sued on except E. M. Gibson had been forged. The proof shows pretty clearly, that the signatures of J. G. and W. A. Sims had been forged, or that they were not genuine; while the evidence as to the signatures of Alkire and Allman was conflicting, and, although each of these latter defendants testified on the trial, neither of them was willing

to swear, and did not swear, that his signature was not genuine.

Upon this state of the evidence this Court can not reverse the finding of the Circuit Court, upon the ground that it was contrary the evidence; because the rule is settled in this State, where the case is tried by a jury or by the court in lieu of a jury, that the appellate court must regard the case as upon a demurrer to the evidence. *Board v. Parsons*, 24 W. Va. 558; *Black v. Thomas*, 21 W. Va. 713.

The evidence proves, that the note was passed by Gibson to the plaintiffs, John S. Lewis & Co.; and therefore the plaintiffs in error claim, that, because the note was a forgery as to J. G. & W. A. Sims, whose liability was primary to that of Allman, there could be no liability against Allman. There is nothing in this claim; for the proof shows, that the plaintiffs are *bona fide* holders of the note for value, and that they acquired the note before its maturity. The legal presumption therefore is, that Allman, the subsequent indorser, was an accommodation indorser either for the makers or Gibson; and our statute provides, that upon any protested negotiable note the holder may maintain an action and recover judgment jointly against all the drawers and indorsers or any one or any intermediate number of them. Code 1887, c. 99, a. 11, 187. The plaintiffs could therefore have sued Allman alone and obtained judgment against him: and he is not prejudiced, because the judgment is against him and another.

After the evidence had been closed, and the court had taken the papers to decide it, including the certificate of protest of the note, on a subsequent day of the term, and before the judgment was entered, a question arose as to whether the certificate of protest had been offered in evidence; the defendants claiming, that it had not, and the plaintiffs, that it had, been offered in evidence. Thereupon the court stated, that it would consider the certificate in evidence, and gave the defendants leave to offer any evidence to rebut the certificate; but no further evidence was offered by the defendants. The defendants in error claim that the court erred in treating this certificate as a part of the evidence in the case. The matter of the order and time of the introduction of evidence is largely in the discretion of the trial-court, and will

not be interfered with in the appellate court, when no injustice is done. When justice requires it, courts are permitted to relax rules relating to the mode and manner of procedure. *Howel's Case*, 5 Gratt. 664; *Bowyer v. Knapp*, 15 W. Va. 278. In this case it would have been error for the court to have refused to consider the certificate of protest, and consequently it did not err in doing so after giving the defendants an opportunity to rebut it. The other errors assigned are too untenable to need notice.

The judgment of the circuit court is affirmed.

AFFIRMED.

WHEELING.

HIMAN v. THORN.

Submitted June 6, 1889.—Decided June 27, 1889.

1. FRAUDULANT CONVEYANCE—STATUTE OF LIMITATIONS.

When a father conveys to his son a portion of his estate for a consideration not deemed valuable in law, said conveyance can not be set aside for that cause only in a suit brought for that purpose after the lapse of five years from the date of said conveyance.

2. FRAUDULENT CONVEYANCE—BURDEN OF PROOF—EVIDENCE.

Where a bill filed by a creditor alleges, that a deed from said father to his son was in fact voluntary although reciting on its face a valuable consideration, and the son in his answer denies the allegation and claims, that he paid a valuable consideration for said land, the burden of proof is on the son to show that said consideration was paid, and the recital of the deed is no evidence against the creditor.

3. FRAUDULENT CONVEYANCE—STATUTE OF LIMITATIONS.

Although fraud in fact after the lapse of five years from the date of the conveyance must be alleged and shown, to impeach such conveyance even as to an existing creditor, yet fraud may be inferred from the facts and circumstances of the case.

M. H. Dent for appellant.

No appearance for appellee.

32	507
35	770
32	507
41	157
32	507
45	660
32	507
52	48
32	507
53	62
32	507
54	484

ENGLISH, JUDGE :

On the 1st day of October, 1867, Dr. Thorn executed his note under seal payable twelve months after date, to Miles A. Himan, or order, for the sum of \$1,500.00 with interest thereon from date, for value received, being the last payment for the purchase-money of said Himan's house and lot in Grafton and one vacant lot in South Grafton; and on the 22d day of September, 1879, Mary L. V. W. Himan, executrix of the last will and testament of said Miles A. Himan, deceased, obtained a decree in the Circuit Court of Taylor county against said Dr. A. Y. D. Thorn for the amount of said note and the interest thereon accrued, under which decree certain property belonging to said Thorn was sold not sufficient however to satisfy said decree, but leaving a balance due on said decree of \$1,165.54; and at the November rules, 1880, said executrix filed her bill in said court against Thorn and others for the purpose of enforcing said decree, which had been docketed against other lands of Thorn, which she alleged were liable to the lien created thereby. In her bill she alleged, that, at the time the debt was contracted, upon which said decree was predicated, Thorn was the owner of a large and valuable estate in the county of Taylor, which he continued to hold, until he disposed of the same by dividing it out among all his children, conveying it all away, until at the time of filing said bill he had nothing left but a very small portion of said estate and was hopelessly insolvent.

Plaintiff also alleges, that on the 13th day of April, 1880, she caused said decree to be docketed on the judgment-lien-docket of the county, and that on the 11th day of April, 1870, three years after the said indebtedness was contracted, Thorn executed a conveyance to his son Abraham Thorn for 123½ acres of land lying in said county, for the nominal consideration of \$600.00, which she alleged never was paid, and never was intended should be paid, and, if paid, was far below the real value of said land; that on the 9th day of September, 1872, five years after said indebtedness was contracted. Thorn executed a deed of conveyance to his daughter Louisiana Houser for 68½ acres of land, worth in reality \$2,000.00 for the nominal consideration of \$500.00 and the natural love and affection of said Thorn for his

daughter aforesaid ; that said sum of \$500.00 was never paid nor intended to be paid by said grantee to said grantor ; that said grantee had no way or means of raising any such sum of money ; that her husband was poor and without property, and that said conveyance was strictly a gift ; that on the 3d day of February, 1873, six years after said indebtedness was contracted, Thorn executed a voluntary conveyance to his son William Thorn for ninety five acres of valuable land lying in said county for the nominal consideration of \$500.00 or \$600.00, which was less than half the value of said land, and that said consideration never was paid and never was intended to be paid ; that on the 31st day of December, 1877, ten years after said indebtedness was contracted, and some time after suit had been instituted to enforce the collection of the same, Thorn executed a deed of conveyance to his son George M. D. Thorn for seventy five acres of land lying in said county, for the sum of \$1,500.00 cash in hand, which sum the plaintiff alleged never was paid, and it was never intended it should be paid ; and that all of said conveyances were made by Thorn to his children upon consideration not deemed valuable in law, and were mere gifts from a father to his children, and having been executed subsequently to the incurring of said indebtedness were as to the same fraudulent and void by law ; that on the 13th day of September, 1879, but a few days prior to the term of court, at which plaintiff's decree was rendered, Thorn anticipating said decree having delayed the rendition of the same as long as it was possible for him to do so, for the purpose of further hindering and delaying the plaintiff in the collection of said indebtedness, and for the purpose of defrauding her, executed another deed of conveyance to James N. Turnley, his son-in-law, voluntarily conveying to him a valuable tract of land containing twenty five or thirty acres, including a grist and saw-mill worth \$2,000.00 for the nominal consideration of \$625.00 which, she alleges, never was paid and never was intended to be paid, and that said Thorn ever since has held and still is continuing to hold and enjoy said property ; that said deed was made not only on consideration not deemed valuable in law but also to delay, hinder, and defraud plaintiff, and to avoid the effects of plaintiff's said decree, and is

therefore void as to her; that Thorn together with Joseph W. and Isaac N. Davis conveyed a small lot of ground to Hiram G. Larew reserving a lien for the sum of \$100.00 unpaid purchase-money; that Thorn owns a small lot of little value in South Grafton in said county, conveyed to him by Miles A. Himan, deceased, and Elenore Thomas; that Fred Bernhold has two separate judgments against Thorn, rendered by the Circuit Court of said county on the 6th day of October, 1879, and recorded in the judgment-lieu-docket of said county on the 25th day of October, 1879; that about \$60.00 remains unpaid on said judgments, and that they are liens on the lot sold by Thorn to Larew, and should be paid out of the proceeds arising from the sale thereof; and she prayed that said lots and tracts of land may be sold in their proper order, and that after the discharge of said Bernhold judgments her decree may be paid and satisfied.

James N. Turnley was made a defendant and answered said bill admitting, that he purchased said tract of land from Dr. A. Y. D. Thorn on the 13th day of September, 1879, at the price of \$625.00, and claiming that he paid the entire purchase-money; that said Thorn owed him a large portion of said purchase-money, and had owed him for years, and that said Thorn proposed to sell him said property at the above-named price, which he then and now believes to have been a fair price, and that his principal object in buying said land was to collect what said Thorn owed him; that he had no purpose whatever of perpetrating or assisting said Thorn in perpetrating any fraud upon plaintiff or any one else; that the price paid was its full value, considering the fact, that the wife of said Thorn did not join in the conveyance, Thorn being about seventy five years of age, and his wife about fifty five. He denied all fraud or intention to hinder or delay plaintiff in the collection of her debt against said Thorn. He admitted that Thorn was his father-in-law and had continued to live on said property since he (respondent) bought it.

George M. D. Thorn was also made defendant and answered said bill claiming, that it was not true, that the conveyance of seventy five acres of land by deed dated December 31, 1879, was upon consideration not deemed valuable in

law and was a mere gift; that he bought said land in good faith from Thorn, and paid him therefor the sum of \$1,500.00, which was a full price for the land; and that his deed was recorded long before plaintiff's judgment was rendered.

Hiram G. Larew also filed an answer, in which he claimed, that the lot of ground near Irontown in said county now owned by him and mentioned in the bill was sold by Thorn to Joseph W. Davis and Isaac N. Davis on the 23d day of June, 1878, and by said Davis to him on the 31st day of January, 1880, and that Thorn had never owned it since the 23d day of June, 1878; that no deed from Thorn was ever admitted to record for the lot in Taylor county until the 9th day of April, 1880, and that the defendant Bernhold's judgments were docketed in the judgment-lien-docket of the county on the 25th day of October, 1879, and are liens upon said lot, unless they have been paid off, but claimed, that they had been paid off in full; that the plaintiff's decree and said Bernhold's judgments were both rendered at the same term of court and are of equal priority and should be paid *pro rata* out of any real estate owned by Thorn, and that therefor plaintiff has not a first lien upon the lot in South Grafton; that Thorn assigned the \$100.00, which he owed him for the lot to John W. Mason on the 9th day of April, 1880, and that on that day Mason notified him of the assignment, and that Mason still claims the same, and denied that plaintiff has any lien upon said lot or said money.

Abraham Thron also answered plaintiff's bill denying the allegation, that said 123 $\frac{1}{4}$ acres of land was conveyed to him on the 11th day of April, 1870, for a mere nominal consideration, and claiming, that he paid \$600.00 for the same, which was a full and fair consideration; that he bought said land and took possession of it on the 27th day of February, 1861, and has been in continuous possession of the same ever since; that at the time of the purchase Thorn made and delivered to him a title bond for the land; that he paid Thorn \$250.00 before the sale and executed his two notes for \$175.00 each for the residue, due in four and six years respectively, which notes have been paid long ago; that Thorn did not make him a deed for said land until the 11th

day of April, 1870, that the deed was recorded on the 5th day of September, 1870, long before plaintiff's judgment was rendered; and that, more than five years have elapsed from the time, when said deed was made to him and recorded, to the time of the commencement of this suit by plaintiff, he denies the right of plaintiff to call in question the validity of the same on account of its being voluntary or for consideration not deemed valuable in law, even if such were the fact.

William Thorn also answered said bill and claimed, that he bought the ninety five acres mentioned in plaintiff's bill from Thorn in the year 1870, at the price of \$600.00, all of which and more too he paid, and that a deed was made to him on the 3d of February, 1873; and he denies the right of plaintiff now to inquire into the sufficiency of said consideration, more than five years having elapsed from the time, when said deed was made to him, to the time of the institution of this suit; and claims, that, if it had been a mere gift, plaintiff could not now have the deed declared void for that cause.

Louisiana Houser and John M. Houser also answered said bill and in their answer claim, that the tract of land conveyed to said Louisiana was so conveyed in consideration of \$500.00 named in the deed; that the same was a full and valuable consideration, and that said consideration was all paid by her, long before said deed was made; that she bought the land and took possession of it in the year 1861, and had had possession of it continuously ever since; that the deed therefor was made to her on the 9th day of September, 1872. They deny, that said land was a gift to said Louisiana, and aver, that, more than five years having elapsed from the time of making said deed before the commencement of plaintiff's suit, said deed could not now be declared void for that cause, if said land had in fact been a gift, and that no other cause is averred in the bill.

Plaintiff then filed an amended bill alleging, that said Thorn transferred and assigned his purchase-money-lien on the Larew property to defendant John W. Mason, and that said Mason now claims to be the owner of said lien. She also alleged, that said Larew, at the time he purchased the property and took a deed therefor from Thorn, had

notice of plaintiff's decree and Bernhold's judgment, and that Turnley had notice of plaintiff's original suit at the time he purchased said land.

On the 2d of August, 1882, a decree was entered directing Commissioner Dent to ascertain the liens and their priorities against the real estate of Thorn and the real estate liable to the payment of the same; and in response to the requirements of said decree said commissioner reported the aggregate amount of the liens against the real estate of Thorn to be \$1,524.21; the amount in favor of plaintiff including interest \$1,436.86; and the amount in favor of Bernhold \$48.35; and that Thorn was the owner of the following real estate, upon which said judgments are liens, to wit, a vacant lot in the town of Grafton, worth in fee \$50.00 and of no rental value, also one fourth of an acre of land, situated near Irontown in Taylor county, W. Va., represented by deed (Exhibit N) filed with plaintiff's bill; and he submitted to the court the question, whether the tract of land conveyed to Turnley by Thorn described in Exhibit M with the bill was so conveyed without consideration deemed valuable in law, or whether the same was made to hinder, delay and defraud his creditors, and also whether the conveyance made by Thorn to his son George M. D. Thorn, on the 31st day of December, 1877, was a gift and not for a valuable consideration; and, if these questions were found affirmatively, then the Turnley tract and the tract sold to his son George M. D. Thorn were liable and should be subjected in the order, in which they are named in said report; and commissioner in support of his report returned the depositions and papers read and upon which the same was made.

The defendant Hiram Larew excepted to so much of said report as charged the lot sold to him with the judgment of plaintiff against Thorn; and on the 7th day of August, 1885, the court by its decree sustained the commissioner's report, so far as it ascertained, that the Bernhold judgment and plaintiff's decree were on equal footing in point of priority, overruled the exception of said Larew, confirmed said commissioner's report and directed, that, unless said judgments be paid in thirty days, the vacant lot in South Grafton and the lot sold by Thorn to Larew be sold by a commissioner

therein mentioned in the order and upon the terms therein set forth; and the court further ascertained from the pleadings and proofs in the cause, that the lands in said bill mentioned and described as conveyed to William Thorn, Abraham Thorn, George M. D. Thorn, Louisiana Houser, and James M. Turnley by Dr. A. Y. D. Thorn are not liable for the plaintiff's judgment, and that none of them should be sold therefor, and directed a dismissal of the bill as to them. From this decree the plaintiff appeals to this Court.

Did the court below err in holding, that the lands in said bill and proceedings mentioned and described as conveyed to William Thorn, Abraham Thorn, Louisiana Houser, George M. D. Thorn, and James M. Turnley by A. Y. D. Thorn were not liable for plaintiff's decree, and that none of them should be sold therefor, and in dismissing plaintiff's bill as to said parties? As to the tracts conveyed by Thorn to his children the conveyances are assailed by plaintiff on the sole ground that they are voluntary; and said defendants plead and rely upon the Code c. 104, s. 14 which limits the time, within which a suit may be brought to set aside a conveyance on the ground alone that it was voluntary, to five years; and I am of opinion, that said plea is a complete defence to plaintiff's suit, so far as said conveyances to Abraham Thorn, Louisiana Houser and William Thorn are concerned.

As to the conveyance made to the defendant George M. D. Thorn it is attacked, on the ground that it was voluntary and was made not only after the incurring of the indebtedness, but after the suit was brought by plaintiff to enforce the collection of the same; and George M. D. Thorn merely denies, that the conveyance was voluntary, and claims, that he bought the land in good faith and paid therefor the sum of \$1,500.00, which is a full price for the land; that all of said money was paid prior to the institution of plaintiff's suit; and that his deed was recorded before plaintiff's judgment was rendered. In the case of *Cohn v. Ward*, *supra*, p. 84 the Court uses the following language: "It is the settled law of this state that the recital in a deed of the payment of a consideration for the conveyance is not evidence as against a stranger, or a creditor of the grantor, assailing

it as voluntary, and therefore fraudulent as to him. In such case the burden of proving that the deed was made for a valuable consideration rests upon the grantee or persons claiming the benefit of the deed." See *Rogers v. Verlander*, 30 W. Va. 620, 5 S. E. Rep. 847. In the last-named case (third point of syllabus) the court held: "Where a subsequent creditor of a grantor assails in a chancery suit a deed made by the grantor, as voluntary and fraudulent, the recital in the deed that the grantee had paid the grantor a valuable consideration is not evidence against the creditor of such payment, and the burden of proving that a valuable consideration was paid by the grantee to the grantor is upon the grantee, but the burden of proving that the deed was fraudulent in fact is upon the creditor." It will be perceived that the defendant, George M. D. Thorn, has taken no proof whatever to sustain the allegation in his answer that he paid his father \$1,500.00 for the land, and that the same was a full price therefor, and that the same was paid before the institution of appellant's suit; but that he seems to rely entirely on the recitals of his deed to show what consideration was paid; and as the burden of proof was on him, and said recitals proved nothing as against the plaintiff's allegation, that the deed was voluntary, said conveyance must be considered and held to have been made by the grantor without any consideration deemed valuable in law, and therefore void as to the claim asserted by the appellant in her suit and the creditors of said Doctor Thorn.

As to the conveyance made by said Dr. Thorn to his son-in-law, William A. Turnley, its validity is assailed on two grounds: *first*, that it was voluntary; and, *secondly*, that said deed was made with intent to hinder, delay and defraud the plaintiff and to avoid the effects of her decree. The burden of showing, that this deed was fraudulent in fact rests upon the plaintiff. In the case of *Livesay v. Beard*, 22 W. Va. 585, this court held: "Fraud may be legally inferred from the facts and circumstances of the case, when the facts and circumstances are of such a character as to reasonably lead to the conclusion that the conveyance was made with the intent to hinder, delay, and defraud creditors;" and, although no depositions were taken by the plaintiff to support the al-

legation of fraud on the part of said Thorn in making said deed to Turnley, there are circumstances apparent in the case, which taken in connection with the depositions of said Turnley and Thorn must lead us to the conclusion, that said conveyance to Turnley was made with intent to hinder, delay and defraud the appellant.

It will be seen, that the debt due the plaintiff was a large one and doubtless by far the largest debt owed by Thorn. It originated as early as October, 1867, at which time it was \$1,500.00; and the interest was allowed to accumulate until the 22d of September, 1879, when a decree was taken for the claim then amounting to \$2,216.91; and under that decree some property of defendant Thorn was sold, sufficient to reduce the debt to \$1,165.57, upon which balance this suit is predicated. Now, is it possible that Turnley, the son-in-law of Thorn, was ignorant of the existence of this debt, to enforce the collection of which suit was pending at the time, when said conveyance was made to him, and had been so pending some time previous thereto? And yet Turnley in his deposition makes the following answers to the questions propounded to him:

Question. "How did you happen to be at Dr. Thorn's at that time?" *Answer.* "Dr. Thorn sent for me." *Q.* "What did he say he wanted with you?" *A.* "He said he could not pay me what he owed me, and he wanted me to buy the place, so that I could make my money?" *Q.* "Why did he say he wanted to sell it?" *A.* "He told me he could not pay me, and wanted to sell the place to me." *Q.* "Did he say anything about owing anybody else?" *A.* "Yes, he spoke of these executions against the place, and that he owed some bills at Wheeling. I do not remember whether he mentioned owing any one else or not." *Q.* "Did he not tell you at that time that he owed the debt due the plaintiff in this case?" *A.* "No, sir; he did not." *Q.* "Did he not tell you that there was a suit pending against him to enforce the collection of this debt out of some property he owned in Grafton?" *A.* "Dr. Thorn told me he had a suit in Grafton, but he did not tell me it was against the property I bought, or against any other property that I know of."

It is, to say the least of it, somewhat remarkable that Dr.

Thorn should send for his son-in-law and tell him he was about broken up and propose to sell him this mill-property to secure said Turnley for some small amounts he had paid for Thorn at different times, and mention nothing about this large claim, which was pressing him most severely, and on which a decree was obtained a few days afterwards; and in this connection it will be noticed, that the plaintiff in her amended bill alleges, that Turnley had notice of her original suit, when he purchased the land; and no answer has ever been filed by him denying said allegation. Another circumstance, which may be regarded with suspicion, is the fact, that the defendant, Thorn, in his deposition, when asked, "Did he not pay you the whole of the purchase-money on that day?" (meaning the day the deed was executed,) answered, "No, sir; he did not. Only that I owed him might have been considered paid." He also states, that he took no writing from Turnley, showing when or how he was to pay the purchase-money; and, when asked, why he did not keep the deed, until the purchase-money was paid, he answered, "The deed was written here and acknowledged and I just gave it to him to have it recorded." It further appears from his deposition, that no settlement was at that time made between him and Turnley, and it was not ascertained what amount was to be paid in cash. Thorn was permitted to remain in possession of the property, after the deed was made and delivered, free of rent, and so yet remains; and no acquittance of any character seems to have been executed or delivered by Turnley to Thorn for the alleged indebtedness of Thorn to him, which he says was to be considered as part of the purchase-money paid; and Turnley seems to have held possession of the notes he claims to have paid for Thorn at the time his deposition was taken in this cause; and, while the testimony in regard to the adequacy of consideration is somewhat conflicting, it seems to me, that the weight of the disinterested evidence is, that the amount contracted to be paid by Turnley was grossly inadequate.

In the case of *Livesay v. Beard*, *supra*, this Court further held in the Syllabus Pts. 5, 6, 8, 9:—"5.—Where the facts and circumstances in any case are such as to make a *prima facie* case of such fraudulent intent, they are to be taken as

conclusive evidence of such intent, unless rebutted by other facts and circumstances in the case.”—“6.—Although a deed may be made for a valuable and adequate consideration, yet, if the intent of the grantor in making it be fraudulent, the deed will be void if the grantee had notice of such intent.”—“8.—Where, after an absolute conveyance of real estate by a debtor in failing circumstances, he remains in possession of the land, without contract, and without accounting for the use of the land, these facts are evidence of fraudulent intent in such conveyance.”—“9.—Concurrent possession of both the grantor and grantee in an absolute deed after the conveyance is a badge of fraud.”

Applying these principles, and the principles laid down in the case of *Lockhard v. Beckley*, 10 W. Va. 87, to the facts and circumstances developed in this cause with reference to the conveyance made by Thorn to Turnley we must conclude, that said conveyance was made with intent to hinder, delay and defraud the plaintiff, and is void as to the claim asserted by her, as executrix in this cause, and also as to the other creditors of said Thorn.

As to the lot near Irontown now held by Hiram G. Larew, which was sold by Thorn to Joseph W. Davis and Isaac N. Davis on the 23d of June, 1873, and by said Davis to Larew on the 31st of January, 1880, it appearing; that said Bernhold's judgments were rendered at the same term of court, that the plaintiff's decree was rendered, any amounts remaining unpaid on said judgements would be entitled to a *pro rata* satisfaction out of property liable thereto belonging to defendant Thorn; and in subjecting said property the plaintiff should resort to and exhaust the other property belonging to Thorn including the tracts, which he attempted to convey to George M. D. Thorn and James Turnley, before resorting to the said lot now held by said Hiram G. Larew.

The decree complained of must be reversed, and the cause is remanded to the Circuit Court of Taylor county for further proceedings to be had therein in accordance with the rules of equity and the principles herein announced, with costs to the appellant.

REVERSED—REMANDED.

WHEELING.

NEELY v. BEE.

Submitted June 13, 1889.—Decided June 27, 1889.

1. PROMISSORY NOTES—SURETIES—CONTRIBUTION.

Where a joint and several promissory note, was executed by D. as principal and B. N. & P., as sureties payable to G., and N. pays a portion of said note after judgment has been rendered against him alone thereon, if such payment was made by N., when he was indebted to D., the principal, in an amount sufficient to pay the judgment so obtained against him, or if after the maturity of said note said N. had in his possession or under his control money belonging to said D. sufficient to pay off said note or judgment and did not so apply it but paid it back to said D., said N. is not entitled to contribution from his co-sureties, even if he afterward paid said note or judgment out of his own money.

2. PROMISSORY NOTES—SURETIES—CONTRIBUTION.

A surety is entitled to the benefit of any indemnity or security held by his co-surety; and if the co-surety has it in his power to pay off and discharge the indebtedness, for which they are jointly liable out of money or other thing belonging to the principal, and fails to do so, he can not call upon his co-surety for contribution.

Stuart & Farr for appellents.

J. V. Blair for appellee.

ENGLISH, JUDGE:

This was a suit in equity, brought by one Floyd Neely in the Circuit Court of Doddridge county against John Donahue, Ephraim Bee, L. W. Percy, administrator of the estate of Joshua Percy, deceased, M. Donahue, and the Grafton Bank. It seems, that John Donahue, Ephraim Bee, Floyd Neely, and Joshua Percy, on the 24th day of August, 1878, executed their joint and several promissory note, payable to the Grafton Bank, at Grafton, West Virginia, or order 120 days after date for the sum of \$400.00. Upon this note an action of debt was brought in the County Court of Taylor county against the parties, who executed said note, but process was executed upon said Floyd Neely alone, and judg-

ment was rendered by said court on the 20th day of May, 1879, against said Floyd Neely alone for the sum of \$410.00 with interest from that date, and costs. An execution was issued on said judgment directed to the sheriff of Doddridge county, which appears to have been levied upon four head of horses, the property of said Floyd Neely, and a forthcoming bond was executed by Neely with M. Donahue, John Donahue, and Joshua Percy as his sureties. On the 4th day of March, 1879, a credit of \$100.00 was indorsed upon said execution, and on the 25th day April, 1881, a judgment was rendered upon said forthcoming bond against the obligors therein for the sum of \$369.14 with interest thereon from the 5th day of March, 1881, and on the 9th day of July, 1883, said Floyd Neely paid upon said judgment the sum of \$383.45; and said action of debt seems to have been dismissed on the first Monday in December, 1884, by plaintiff's attorney as to the defendants J. Donahue, Bee, and Percy, who were never served with process therein.

The plaintiff in his said bill alleges, that by reason of his having been the surety of said John Donahue, and the co-surety of Ephraim Bee and Joshua Percy he has been forced and compelled by due process of law to pay said sum of \$383.45 to the sheriff on said debt; that neither said Bee nor Percy paid any portion of said debt, and he never has been reimbursed in whole or in part for the money paid by him as aforesaid; that the residue of said debt was collected of said Donahue, that being all that could be made or collected of him; that said principal was then and has been ever since totally insolvent, and that said Bee and Percy are the only persons, to whom he can look for contribution; and he prays, that they be compelled to contribute their just and equal proportion of said money so paid by plaintiff Neely.

The defendant Bee answered said bill admitting the execution of said note but says, he signed it at the special instance and request of said Neely, who agreed to hold and save said Bee harmless therefrom; and said Bee claimed that the said Neely, having executed said forthcoming bond and having allowed the same to be forfeited, and having permitted the judgment thereon, released and exempted him from any liability on the original note for the amount of the

same or any part thereof. Said Bee also alleged in his answer, that at the date of said note, and after the same became due, and until suit was brought thereon, and till and at the time of the payment of the debt and judgment by said Floyd Neely, the said Neely had moneys and property and funds in his possession and under his control belonging to the defendant, John Donahue, and could have paid said note; which money, funds and property he paid over to said John Donahue in person instead of applying the same to the payment of said note and the judgment thereon, which he could and should have discharged and paid with said money, funds and property of said Donahue; and that the money, funds and property with which said Neely paid said judgment was the property of the said John Donahue, who was principal in said note.

The administrator and heirs also answered said bill claiming, that said Floyd Neely did not pay said debt with funds of his own but with money belonging to said J. Donahue, and that, after said note fell due, said Neely had in his possession money and property of said John Donahue, with which he might and could have paid said debt; and that said Neely and John Donahue colluded together to defraud the other sureties on said note out of the money now sought to be obtained by way of contribution from the other sureties; that said administrator settled the estate of his intestate and in doing so published notice for creditors to bring forward their claims, of which said Neely had notice but failed to bring forward any claim or make any demand for payment.

Several depositions were taken in the cause, bearing upon the time and manner of the execution of said promissory note and the *status* of accounts between the plaintiff, Floyd Neely, and John Donahue, the principal in said note, at the time the same was executed; and on the 2d day of August, 1886, a decree was entered therein ascertaining, that the plaintiff had been compelled by due process of law to pay \$883.45 to the Grafton Bank on said promissory note, and that he was entitled to call upon the defendant Ephraim Bee and the estate of Joshua Percy, deceased, to contribute the one third part thereof, and directing a commissioner of the

court to calculate and state the proportionate share, which the said Bee and the Pearcy estate should pay, and such other matters, as he might deem pertinent, or as might be required of him by said parties.

Upon a question raised by the answer of the appellant, Ephraim Bee, as to inducements held out by him by said Floyd Neely to become a party to said note, and representations and promises, that he should lose nothing by so doing, and that, if said Donahue failed to pay said note when due, he (Neely) would hold said Bee harmless, this was an affirmative allegation made by said Bee by way of defense, and the burden of proof was upon him; but upon examining the testimony it is found, that, while said Bee swears positively, that these promises and representations were made to him by said Neely to induce him to sign said note, the said Neely in his deposition is just as positive, that no such promises ever were made; and so, if the parties are to be regarded as equally worthy of belief, Bee fails to prove his allegation.

As to the allegation in the appellant Bee's answer, that the plaintiff, Floyd Neely, had moneys and property and funds in his possession and under his control belonging to the defendant, John Donahue, out of which he might and ought and could have paid said note, which money, funds and property he paid over to Donahue instead of applying it to the payment of the note and the judgment thereon, the questions of fact raised by said allegation were referred to a commissioner, and a large number of witnesses were examined as to the *status* of accounts between Neely, and Donahue subsequent to the execution of the note, which bears date August 24, 1878, and was made payable 120 days after date with interest; and the effort seems to have been made by Neely to show a balance in his favor, at the time he paid the sum of \$383.45 on the judgment, which was the balance remaining unpaid thereon after crediting about \$100.00 realized out of the sale of some property belonging to Donahue, and which amount was paid by Neely on the 9th day of July, 1883.

The commissioner seems to have returned several reports and supplemental reports. In his supplemental report dated

December 4, 1886, he finds a balance due Neely from Donahue of \$793.07. In his report, dated July 18, 1887, he finds the balance in favor of Neely due from Donahue to have been on the 9th of July, 1883, \$476.05.

To these reports exceptions have been filed by the appellant and also by the personal representative of his co-surety Joshua Pearcey. In regard to the items of account presented by the parties before the commissioner it is very difficult to ascertain, what portion of them ought to have been allowed or rejected. In his report dated July, 1887, he says: "It is very hard for your commissioner to pass upon them," [meaning these items] "as to the preponderance of testimony," *etc.* It however appears, that Donahue was sheriff of the county of Doddridge from January 1, 1877, to December 31, 1880; that this note was executed on the 24th day of August, 1878, payable 120 days after date; that very intimate relations existed between Donahue and Neely during that period and afterwards; and when said Donahue, in giving his deposition, was asked the question: "Did you, during the time beginning January 1, 1887, and ending December 31, 1888, while you were sheriff of Doddridge county, furnish to Floyd Neely personally, or to Floyd Neely and Luther Martin, under the firm name of Neely & Martin, or to Floyd Neely, for use of the boom company at Grafton, any sum or sums of money or other securities?" he answered: "The firm of Neely & Martin didn't get any from me. I loaned Col. Neely some. I didn't furnish any to the boom-company"—and he files with his deposition a statement marked "X," showing the amounts he let Neely have during that time; and by reference to said exhibits we find that Donahue, during the time he was sheriff, loaned Neely at different times \$1,424.86, and from that time until March, 1883, he loaned him \$342.14 more; but taking the statement X, filed by Donahue, of his account against Neely, and the statement A. filed by Neely, of his account against Donahue we find, that between January, 1887, and January, 1883, there was a balance in favor of Donahue of \$481.26, and the greater part of said balance accrued after the maturity of said note. Again Donahue in giving his testimony was asked, "During the time you were

sheriff of Doddridge county after the date of that note, and since you were sheriff up to the present time, has Floyd Neely been indebted to you in any sum?" and he answered, "I couldn't tell how it would be, because we have had no settlement. He got some money from me, but we have had no settlement. He gave me a good deal of orders. He asked me if they were not as good as the money to me, and I told him they were." "Did he give you that good deal of orders since the execution of that note?" *Answer.* "I could not tell, whether it was before or since. He was giving them to me along, I suppose,—some before and some after.

Although there were other accounts existing between said Donahue and Neely both before and subsequent to the time he was sheriff of said county, yet the state of accounts during that period is most material; for said note was executed August 24, 1878, and fell due in December, 1878, and said Neely allowed suit to be brought against him on said note, and process according to the statement of his bill was served upon him on the 13th day of February, 1879, and judgment was rendered against him on the 20th day of May, 1879, for \$410.00; and according to said Donahue's statement he loaned said Neely in cash subsequent to that time over \$500.00. This money Neely claims, that he paid back to Donahue in county orders, state claims, etc., and if he did so, it was with full knowledge of the claim, on which suit had been instituted against him and his co-sureties, part of which he claims was paid after said judgment was rendered. But with money in his own hands sufficient to have paid off and discharged said note, before it was sued upon, he allowed costs to be added and a judgment to be rendered and the expense of a forth-coming bond to be added and invested the money he has received from said Donahue in county orders and State-claims, and turned them over to him, instead of discharging this note, for which he and his co-sureties were liable as the security of said Donahue. Would it be equitable under the circumstances developed by the evidence in this cause, to allow said Neely to compel his co-sureties to contribute any portion of the amount so paid by said Neely on said judgment?

Something has been said about the question of jurisdiction

in cases of this character. We regard it as well settled, that equity will take jurisdiction in a suit brought by one surety against his co-sureties to compel contribution. In Barton's Chancery Practice volume 1, p. 216, § 72 we find it said: "To avoid multiplicity of suits, and in order that in one proceeding there may be contribution among the parties, the sureties as well as the principal debtors should be made parties," etc., to a suit in equity of this character.

Returning then to the question whether equity would allow Neely under the circumstances of this case to compel contribution from his co-sureties, in the case of *Currier v. Fellows*, 27 N. H. 366, we find the court holds, that a surety is entitled to the benefit of any security held by his co-surety; and in *Brandt*, Sur. § 238, p. 334, we find that "it has also been held, that the surety who has partial indemnity in his hands in the shape of property of the principal can only recover from a co-surety one half the amount paid by him after deducting therefrom the value of the property." Of course if said co-surety has in his hands sufficient property or money to wholly indemnify him, he can recover nothing from his co-sureties.

The view that I take of this case renders it unnecessary to pass upon the questions raised in argument as to the effect of the execution of the forth coming bond by Neely; but I will say, that such a bond executed by a surety, in which the principal debtor does not join, would not have the effect of releasing a co-surety who was no party to said bond. I am however of opinion, that the facts disclosed in this case as to the intimate business relations existing between Donahue and Neely, and as to the large amounts of money passing between them at or near the very time suit upon said note was being pressed, show conclusively, that Neely had it in his power to pay off and discharge said note on more than one occasion with money in his hands belonging to Donahue, and that it would be inequitable under the circumstances to allow Neely to enforce his claim for contribution against his co-sureties.

The decree rendered in this cause on the 6th day of September, 1887, must be reversed, and the plaintiff's bill dismissed with costs to the appellant, Ephraim Bee.

DISMISSED.

WHEELING.

HOOPER v. HOOPER.

Submitted January 18, 1889.—Decided June 27, 1889.

1. EXECUTORS AND ADMINISTRATORS—PARTNERS—SURETIES.

Two parties are engaged in business in another state,—one living in this state, one in the other,—and the one living in this state dies, and the other becomes one of his executors under a qualification in this State. At his death the business is to be closed up, and partnership-debts are to be collected and paid, and the effects sold. If, when this is accomplished, the survivor is insolvent, the sureties in the executorial bond are not liable for the interest of the deceased in the partnership; but if said survivor is then solvent, they are liable.

2. EXECUTORS AND ADMINISTRATORS—PARTNERS—SURETIES

If at the time when it may be said under the law, that the business was in such condition, that it was the duty of the survivor to turn into his hands as executor the share of the deceased in the assets, the survivor was insolvent, his sureties in such bond are not liable; if he is then solvent, they are liable.

3. EXECUTORS AND ADMINISTRATORS—PARTNERS—SURETIES.

If, when the survivor makes a statement of receipts and disbursements as surviving partner in winding up the business showing a balance in his hands to be divided, he is insolvent, so that such balance is not substantial assets, his sureties in such bond are not liable for such balance; if he is then solvent, they are liable.

4. EXECUTORS AND ADMINISTRATORS—SURETIES.

Liability of sureties in the bond of an executor or administrator is limited by the terms of the covenant of the bond and can not be extended by implication.

5. EXECUTORS AND ADMINISTRATORS.

A judgment against an executor is conclusive both as to the validity and amount of the demand on both executors and legatees.

6. SALE—PROMISE.

Where A. for a valuable consideration paid by him purchases property of B, which is by the terms of the sale to be conveyed to C. and is afterwards so conveyed, and C. promises in consideration thereof to pay a debt due from A. to D., the promise of C. to pay such debt though not in writing is binding on him, if assented to by D.

32	526
35	39

32	526
47	831

32	526
51	502

32	526
54	632
54	654

32	526
55	602

32	520
63	379

32	526
65	318

65	320
65	759

32	526
65	294

65	295
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7. WITNESS.

After C.'s death D. is a competent witness to prove C.'s promise.

8. EXECUTORS AND ADMINISTRATORS—NEGLIGENCE.

An executor is not to be charged with a debt when it becomes due, but only when he actually receives it, unless it is shown to have been lost by his negligence or improper conduct.

9. EXECUTORS AND ADMINISTRATORS.

A debt due to an executor individually from a legatee may be insisted on as part payment of the legatee's legacy.

Woods & Martin for appellants.

A. F. Haymond for appellees.

BRANNON, JUDGE:

This cause has been in this Court once before. See 29 W. Va. 276 (1 S. E. Rep. 280). Since it was remanded to the Circuit Court of Marion county, additional evidence has been taken, and a further report has been made by Commissioner Hayden, to which exceptions were filed by plaintiffs and defendant Sarah Hooper, and by defendants Brinkman, Doonan, and Grimes, administrator of Charles E. Hooper, and by defendant Whitescarver. On these exceptions the case here turns. This is an appeal from a decree of the Circuit Court of Marion, taken by the plaintiffs and Sarah Hooper; and some errors have been assigned by defendants Brinkman and Doonan.

A very important matter in the cause, raised by appellants' exceptions Nos. 1-5, inclusive, is as to certain furniture and other personal property employed in the operation of a hotel at Cumberland, in the State of Maryland, known as the "Revere House." Shall its value be decreed against the sureties in the executorial bond given by W. S. Hooper and Charles E. Hooper as executors of John W. Hooper, deceased, upon their qualification before the recorder of Taylor county, West Virginia?

The bill treats this property as the property of the decedent, John W. Hooper, never suggesting, that it was the property of a partnership composed of John W. Hooper and his son, Charles E. Hooper, one of his executors; but Charles E. Hooper in his answer denies, that it was the property of

John W. Hooper, and alleges, that such a firm existed, and that this property was owned by said firm.

When Judge JOHNSON delivered the opinion on the former appeal, he held that the evidence did not establish such a partnership, and hence he did not place the opinion on that basis, but treated this property as the sole property of John W. Hooper. The question then arose whether this hotel-property, which at John Hooper's death was in Cumberland in the hands of Charles E. Hooper, who was managing said hotel, and part of which was there sold by Charles E. Hooper, and a part brought into this State and sold by him, could be charged to the executors and their sureties. Judge JOHNSON, after discussing the case of *Tunstall v. Pollard*, 11 Leigh, 1, and other cases, says: "In none of the cases, which we have seen, was the direct question decided which is here presented, whether the sureties are liable for goods brought by the executor from another state into this and wasted. If the executor, as such, is liable, there can be no doubt his sureties are." Nor did he decide the question, though his evident leaning is in favor of the position that they would be liable. As I do not think the case, as it now is, involves that question, I simply refer to authorities bearing on it. *Tunstall v. Pollard*, 11 Leigh, 1; *Powell v. Stratton*, 11 Gratt. 792; 1. Rob. Pr., (New.) 162, 166, 189, 191, 192; *Schouler, Ex'rs*, §§ 174-176; *Andrews v. Ivory*, 14 Gratt. 229; *Mackey v. Coxe*, 18 How. 104; *Wilkins v. Ellett*, 9, Wall. 740; and cases cited 29 W. Va. 291 (1 S. E. Rep. 280); *Burnley v. Duke*, 2 Rob. (Va.) 130.

As above stated, Judge JOHNSON did not decide the question just indicated; but his decision, that the bond held its obligors liable for this hotel-property, rested on the fact, that the will directed the sale of testator's personal property, "wherever situated," and, the bond having covenanted for a faithful discharge by the executors of their duties under the will, the court held the sureties responsible for the proceeds of such sale. But since that decision evidence taken in the case has established, that a partnership existed between John W. Hooper and Charles E. Hooper in the name of J. W. & C. E. Hooper in the carrying on of the Revere House hotel, and the property in question was property of the firm not of John W. Hooper solely; and so this clause of the will di-

recting the sale of testator's property could not apply to it, and therefore the reason so pointedly stated by Judge JOHNSON on page 297, 29 W. Va. (1 S. E. Rep. 296) as the ground of the decision, does not now apply. The able counsel for appellants in his brief virtually concedes that this partnership has been proven, and argues on that basis.

Therefore the question now is: Are the sureties in the executorial bond liable for the testator's interest in this property? At testator's death this property was in the hands of Charles E. Hooper, the legal title vesting in him as surviving partner with power to sell. *Hooper v. Hooper*, 29 W. Va. 285 (1 S. E. Rep. 280). It was the duty of Charles E. Hooper as surviving partner to close the business, collect the assets, dispose of the effects and after settling debts against the firm to adjust the accounts between himself and his co-partner, and turn over to his estate his interest in the net social assets after discharging the social debts. But this duty, we may say, arose before the executorial bond was given; at least he had formed a relation,—that of co-partner,—from which that duty might at any moment fall upon him. It did fall upon him. Then this property was in his sole and exclusive possession as surviving partner and in another state. He still carries on the hotel for eight months after his father's death, and incurred expenses in so doing, lost in so doing the property there in larger part, brought some to this State, sold it, and wasted it. It is true, he had no right after his father's death to continue this business. Story, Part. § 343; *Hooper v. Hooper*, *supra*. But he did continue it. Are the sureties liable for the misconduct and waste of the partnership-property by the surviving partner, because he was executor?

The liability of a surety in the bond of an administrator or executor is limited by the terms of its covenants and can not be extended by implication. 7 Amer. & Eng. Cyclop. Law, 217. Courts go no further against sureties, than the scope of their obligation compels. Brandt, Sur. § 102. The condition of the bond in this case is for the faithful discharge of their duties as executors. Clearly the duty of closing the partnership and paying over to himself as executor the share of John W. Hooper in the firm assets rested on Charles E. Hooper as surviving partner, in the first instance;

(1) because his position as partner with all duties which might ensue therefrom, began before he became executor; (2) because the legal title of the partnership property, the exclusive possession, the sole and absolute power of selling it and the function of paying debts were all vested in him. John W. Hooper's estate was not at the instant of his death vested with any right to a specific sum in it, but only an interest to be developed by a collection and disposition of the firm-assets and satisfaction of the firm-debts. Before his estate could be said to have any defined interest, it must undergo closing and settlement consisting, it may be, in the performance of many acts with the consumption of considerable time. This did not take place for a considerable time after his death, if it even has yet; and when it did take place, C. E. Hooper may have been insolvent, for there is considerable evidence to show his insolvency. The sureties did not expressly stipulate in the bond for the proper performance of C. E. Hooper's duty as surviving partner; but it is claimed, that, as C. E. Hooper had these partnership-assets in his hands and should have saved and accounted for them and not wasted them, as they were a debt due from him to the estate, he should have collected them as well from himself as if they had been in the hands of another person. But the answer is, that until the closing of the partnership there was no ascertained debt in favor of the estate, and he may have failed in his duty as partner, before the time came for him to act as executor in reference to that fund, and, when that time arrived, he was perhaps insolvent.

It is also to be added, that this property was in another state, the business in another state, and he sold and realized the bulk of the assets there and never brought a large part of the property into this State; he brought here, if insolvent, only a naked liability of an insolvent man. If he had given a bond as partner and was insolvent, could the sureties in that bond shift the liability from their shoulders to rest upon the sureties in the executorial bond? I think not.

In *Gilmer's Adm'r v. Baker's Adm'r*, 24 W. Va. 72, it was held: An insolvent fiduciary can not transfer his mere indebtedness in one capacity to himself in another capacity, so as to exonerate his sureties in the one capacity, and throw

the burden upon his sureties in the other. To make the transfer valid in such case it must consist of something more than a naked liability; it must be substantial assets. But if substantial assets be in the hands of the fiduciary, or he is solvent and liable to pay over his indebtedness in the one capacity to himself in the other capacity, all that is required to make the transfer in such case is for him to make his election to hold it in the latter capacity, and manifest that election by some act, admission, or declaration, and such election will bind his sureties on his bond given in the latter capacity."

These principles apply to this case. The sureties did not guaranty for the conduct of the surviving partner. If he acted badly as such, and at the time, when he should have turned over the assets as surviving partner to himself as executor, at the close of the partnership, he was insolvent, why should the sureties pay his defaults as surviving partner? In *Pearson v. Keedy*, 6 B. Mon. 128, the Kentucky court of appeals held, that partnership funds coming to the hands of a surviving partner, who has been appointed administrator of a deceased partner, come to him as survivor not administrator, and that the sureties are not liable therefor. We do not go so far. But we hold, that, if the survivor wastes the social assets, and, when the partnership affairs are or under the law should be regarded as closed, the survivor is insolvent, his sureties as personal representative are not liable; but, if he is solvent at that time, they are liable.

The case of *Caskie's Ex'rs v. Harrison*, 76 Va. 85, is cited as sustaining the contrary. That case may be distinguished from this on its particular facts. Judge STAPLES, in his opinion, says: "It appears that, at the death of John Caskie, James Caskie was indebted to the firm \$10,000.00 in round numbers. Between the death of John Caskie and the month of September, James Caskie collected funds belonging to the firm to the amount of \$62,000.00, nearly all of which were in the year 1868 embarked and lost by him in private cotton speculation. * * * It is obvious that whatever may have been the trouble or delay in disposing of the tobacco in foreign ports, there could have been no sort of difficulty or obstacle in the way of a proper disposition of the funds

actually received by James Caskie, and converted by him to his own private use. He was in possession of all the books, accounts, and papers of the concern, and must be presumed to be familiar with its condition, assets, and liabilities.

* * * He knew certainly that the partnership owed no debts, and all he had to do was to divide the money, as it was from time to time received, between himself and the estate of his deceased partner."

Here note that the firm owed no debts. The reporter puts that fact in italics. Note that Judge STAPLES thought, that, this being so, the survivor should have turned over the half of the \$10,000.00 and the \$62,000.00 at once, because they were not needed to adjust partnership-debts. Note that he seems to recognize a distinction between this money actually realized and the tobacco in foreign ports. Note that these sums actually in the hands of the executor and not needed for partnership-debts were invested by the survivor in his own private cotton speculations.

But in this case at the death of John W. Hooper the assets were to be sold and collected, and debts were to be paid, both consisting of many items as claimed by exhibits filed by Charles E. Hooper, and which he testifies to. The surviving partner never did any act electing to hold this property as executor except in regard to the sum of \$223.35, the balance shown by his said exhibit, which was charged against the sureties by the decree. But we are without *data* to decide finally this feature of the case. There has been no settlement of partnership-accounts in this case. There are several questions, which the record does not satisfactorily answer. Was there any and, if any, what surplus remaining after payment of partnership-debts? What was the amount of John W. Hooper's interest in such surplus all or a part of it? When was the partnership closed? When were its last debts paid? When the partnership was closed, was Charles E. Hooper insolvent? If he was then insolvent, the sureties would not be bound for the interest of John W. Hooper in such surplus; otherwise they would. There must be a formal settlement of the partnership-accounts to ascertain what was the surplus, if any, and John W. Hooper's interest in it, and to ascertain the date of the close of the partnership,—

that is, when the last substantial debt was collected, or the last valid debts paid, (*Boggs v. Johnson*, 26 W. Va. 825; *Sandy v. Randall*, 20 W. Va. 244;) and whether, when such close of partnership occurred, Charles E. Hooper was insolvent. The Circuit Court erred in acting on this partnership matter against the appellants in decreeing only \$223.35, without having a settlement of the partnership-accounts, and against appellees in decreeing even that sum in the absence of such definite settlement.

Appellants' Exception No. 6. Shea debt. In their *ex parte* settlement this note was charged to executors principal and interest by separate items. This makes it *prima facie* a correct charge. In his answer Charles E. Hooper alleges, that it was not collected, but there is a general replication to this answer. The note is not produced, so far as I see, or proven in executor's hands. If not collected, why not produce it? Though with that settlement there is returned a list of insolvent notes, this is not among them. Charles E. Hooper does not in his deposition say anything about it. Shea's mother testifies, that he never had any property, but does not say, he never paid this note. We think it should be charged, and that there was error in overruling this exception.

Appellants' Exception No. 7. George W. Brown & Co. debt, \$271.02. In the first *ex parte* settlement are found two items of \$200.00 and \$231.22, allowed as disbursements to the executors for payments to George Brown. Turning to the account made out in name of G. W. Brown & Co. against J. W. Hooper these two items are found there as payments. This is the same account. The receipt was signed "G. W. BROWN." Hence the items credited in the *ex parte* settlement are credited in his name. Their presence in that settlement makes them *prima facie* correct. C. E. Hooper makes oath to the justness of the charge, and the affidavit of G. W. Brown asserts their justness and the fact of payment by the executor. C. E. Hooper in his deposition says, he examined into this and other demands and believed them just. John W. Hooper kept the large hotel known as the "Grafton House" and an eating house at Parkersburg, and the charges are for whisky,—an article likely

to be consumed in such business. I do not think the charge should be disallowed. The account was for a larger amount, but some of it was sold after John W. Hooper's death, while, as the evidence shows, the family still kept the Grafton House; but the commissioner has allowed only the sales prior to John W. Hooper's death, two items of \$91.32 and \$179.70, making the \$271.02. No error in overruling this exception.

Appellants' Exception No. 8. Rogers' debt. The credit of \$762.02 is erroneous. Rogers sued the executors in *assumpsit* on this beef account, and recovered judgment for \$570.43. The matter in issue in that action was, whether any and, if any, what amount was due from Hooper's estate to Rogers; and the judgment is conclusive as to the validity and the amount of debt both on the executors and the legatees. Bigelow, Estop. 78; *Corrothers v. Sargent* 20 W. Va. 351. "A judgment against an administrator is binding on the creditors and legatees of the estate." Freem. Judgm. § 163. There was error in overruling this exception.

Appellants' Exception No. 9. John W. Hamilton's debt. Charles E. Hooper owed Hamilton \$1,000.00. Said Hooper sold a stock of goods to Casteel for \$1,000.00 of which \$100.00 was paid in cash, \$1,000.00 in a lot in Grafton. By the agreement of sale this lot was to be conveyed and was afterwards conveyed by Casteel to John W. Hooper, and the \$100.00 cash payment was credited by Casteel on an account of his against John W. Hooper. Of this arrangement John W. Hooper was aware, approved it and accepted the deed for the lot from Casteel, in fact most likely advised and procured the arrangement. He allows his son to sell his goods to pay for a lot to be conveyed to him, and in consideration of such conveyance promises to pay Hamilton this \$1,000.00 debt due him from the son. It is contended by the plaintiffs, that it is not a valid debt against John W. Hooper's estate, because it was a promise to pay the debt of another and not being in writing is void under Code, c. 98, ¶ 4, which provides: "No action shall be brought to charge any person upon a promise to answer for the debt, default or misdoings of another," unless the promise be written. This statute does not apply to this matter. It is a part of what is called in the law-books

"the statute of frauds and perjuries" and was made to suppress frauds; but, if applied here, it perpetrates a fraud. This instance is simply an original promise by John W. Hooper based on the valuable consideration of a conveyance of a lot to him to pay money in return as purchase-money for the lot. He buys property and agrees to pay for it. Does not the transaction create a debt against him? Is it not his own debt he agrees the pay? The mere circumstance, that he agreed to pay that debt in a particular way,—that is pay it to Hamilton on a debt due him from Charles E. Hooper,—does not make it any the less his own debt. He might have agreed to buy property and deliver it to Charles E. Hooper or to deposit the money in bank or to pay a debt for him. The stipulation to pay it to Hamilton was but an incident or circumstance in the transaction not its essence; for that was the reception by John W. Hooper of property and his promise to pay for it. Browne, St. Frauds, § 166, says:

"Under the same head may be treated those arrangements frequently made by which one man who owes a debt to another agrees with him to discharge the obligation by assuming and paying a debt which he (the creditor) owes to a third person. Upon such an agreement, if so communicated to him and accepted by him as to make him privy to it, such third person may of course resort to the party making the promise, and recover the amount of his immediate debtor's obligation. Nor is the promise of the defendant in such case within the statute of frauds, as to pay the debt of another."

In *Barker v. Bucklin*, 2 Denio, 45, a party owed a debt and delivered to his brother horses, and the latter agreed to pay their price to the creditor on his debt against his brother; Judge JEWETT says: "It was not a promise to answer for the debt of another person, but merely to pay the debt of the party making the promise, to a particular person designated by him, to whom the debt belonged, and who had a right to make such payment a part of the contract of sale. Such promise was no more within the statute of frauds than it would have been if the defendant had promised to pay the price of the horses directly to his brother, from whom he purchased them."

If Charles E. Hooper himself had conveyed the lot to his father for \$1,000.00 to be paid to Hamilton, he assenting, would not such promise, though oral, have been valid? He procured another to convey it. He simply procured another to convey it, he paying his stock of goods, thus prejudicing himself, which would be a valuable consideration moving from him.

In *Dearborn v. Parks*, 5 Greenl. 81, a purchaser of land agreed as part of the price to pay outstanding notes of vendor on the land. The court held it good not in writing, Judge WESTON saying, that, although the effect was to pay another's debt, yet the defendant paid his own debt, and that constituted "the operative motive by which he was actuated." If there is an understanding between the parties, that the defendant in consideration of his own indebtedness shall pay the plaintiff what is owing him by another, it seems reasonable to regard the transaction as a mere payment by the defendant of his own debt, though the language of the parties would not be formal to that effect. *Browne, St. Frauds*, § 166 *et seq.* Roberts states the rule to be, that, if the consideration of the new promise "spring out of any new transaction or move to the party promising on some fresh and substantive ground of a personal concern to himself, the statute of frauds does not attach." See *Browne, St. Frauds*, § 212.

In *Sayre v. Edwards*, 19 W. Va. 359, where it was argued, that the promise was void under the statute, JOHNSON, P., said: "This is incorrect, because it was not to pay the debt of another, but to pay an obligation which he had individually assumed; that is, to pay his own debt."

Judge LEE, in *Hopkins v. Richardson*, 9 Gratt. 494, says of the promise in that case: "It seems to fall rather within the third class of cases mentioned in *Story on Promissory Notes*, § 457, where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties, which class of cases, the author adds, is not within the statute of frauds. The distinction between this class of cases and those in which the promise is regarded as an undertaking for the debt of another within the statute of frauds is

also recognized in *Forth v. Stanton*, 1 Saund. 211, note 2, and by Chief Justice KENT, * * * in *Leonard v. Vredenburg*, 8 Johns. 29-32."

"The statute contemplates a promise to answer for another's debt; a promise for that purpose; a mere guaranty; and it never was meant that a man should set it up as a pretext to escape from the performance of a valid promise for another purpose because, in performing that, another's debt was indirectly involved." Browne, *St. Frauds*, § 212.

"Where a debtor transfers funds or property to another for the purpose of paying his debt, and the person thus holding the debtor's funds or property promises the creditor to pay his debt, such promise is held good, though not in writing. * * * We apprehend the true principle why the promise to the creditor is valid without writing is the same in both these classes of cases. In both the party making the promise holds the funds of the debtor for the purpose of paying his debt; and, as between him and the debtor, it is his duty to pay the debt, so that when he promises the creditor to pay it, in substance he promises to pay his own debt, and not that of another; and, though the debtor still remains liable for the debt, his real relation is rather that of a security for the party whose duty it is and who has promised to pay his debt, than of a principal for whom the other has become security or guarantor. He holds a fund in trust under a duty to pay it to the creditor. * * * The cases which decide that where a creditor holds a security for his debt, and surrenders it to a third person for his own benefit, upon his promise to be answerable for the debt, stand really upon the same substantial principle." *Fullam v. Adams*, 37 Vt. 397; Browne, *St. Frauds*, p. 259, note 1.

Hamilton accepted this arrangement. Though not a party to it, (unless the statute prevents, which it does not) on the promise to pay his debt he could sue John W. Hooper under Code 1887, c. 71, s. 2, providing: "If a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party

making such covenant or promise." 3 Rob. Pr. (New,) 20. Had John W. Hooper failed to pay the debt, and Charles E. Hooper had paid it, he could have sued his father for damages for breach of his promise to pay.

Our attention is called to the case of *Radcliff v. Poundstone*, 23 W. Va. 724, which holds: "Where the consideration of a defendant's undertaking or promise is for money or property to be furnished to or received by a third person, if the transaction be such, that the third person remains responsible to the person, who furnishes him with such money or property, or from whom the consideration proceeds, such promise or undertaking is collateral and under the statute of frauds will not bind the defendant, unless in writing." But at once it is seen, that this does not fit our case. "Where the consideration of a defendant's undertaking or promise is for money or property to be furnished to or received by a third person," says that case. Here the third person is Charles E. Hooper. But in this transaction between Casteel and the Hoopers nothing was to go to Charles E. Hooper; no promise to pay him anything was made; but he paid his goods to get property conveyed to his father, to induce him to pay Hamilton's debt, such conveyance being the consideration of the father's promise. From it no principal liability was imposed on him, to which his father's promise could be collateral. His liability to Hamilton remained, it is true, but it was not born of this transaction: So this was a valid debt against the estate and properly paid by the executors.

I do not forget that Judge JOHNSON on page 298, 29 W. Va. (S. E. Rep. 297) not expressly mentioning this debt, but probably having it in view said: "Of course no debt of another assumed by the testator is chargeable to the estate, unless that assumption was in writing." Then there was no evidence to sustain it except Hooper's, which was incompetent. Since then Casteel's evidence has been taken. Judge JOHNSON did not intend this casual remark as deciding this matter.

It is argued, that Casteel is not incompetent as a witness. He is not a party to the suit. He is not one, from through or under whom Charles E. Hooper derived any interest or title by assignment or otherwise. It is said that Charles E.

Hooper is assignee of Casteel. Assignee of what? Casteel sold him a lot to be conveyed to John W. Hooper, but no title, legal or equitable, ever vested in Charles E. Hooper; for by the terms of the sale it was to go to John W. Hooper. Even if it might be said, as counsel suggests, that he sold Charles E. Hooper the lot, and he sold it to his father, that lot has been conveyed to the father and is not involved in this case. Casteel has no interest to be furthered by his evidence; and it is to prevent a living man from furthering his own interest either in his own behalf or in behalf of his alienee or assignee, where he will be prejudiced by the failure of alienee or assignee to make good his title and so come back on him, that the statute as to the evidence is intended. I do not perceive, that Casteel's connection with this matter is such as to inspire in him a motive from self-interest to favor Charles E. Hooper. It is suggested, that he is assignee of John W. Hooper. He conveyed to him a lot, but it is not involved; nor is Casteel seeking to establish a debt in his favor against John W. Hooper.

Appellants' Exception No. 10. As to \$127.34 paid Hoffman; \$123.33 paid Horner; \$27.60 paid Dent; and \$25.86 paid Forbes & Collins. Charles E. Hooper includes these items in a list of items paid by him, and in his deposition says: "Before any of the foregoing claims were paid, I examined them as carefully as I could, and believe them to be proper charges against the estate. In most of the cases I knew my father was dealing with the parties who presented the claims." His brother and co-executor says: "He was not indebted to either of them in any sense," saying no more, giving no reason, not indicating that he had any knowledge as to them. The item paid Dent is allowed in first *ex parte* settlement and is therefore *prima facie* right. It is verified by Dent's affidavit. In said settlement an item of \$20.61 is allowed, not of Forbes & Collins, but Forbes, Collins & Craig. Inspecting the Forbes & Collins account, I find at one point:

Balance.....	\$25 86
Board.....	5 25
	<hr/>
	\$20 61

Undoubtedly this is the same account found in *ex parte* set-

tlement, and the sum \$20.61 at bottom of account is inadvertently allowed instead of \$25.86. This *ex parte* settlement gives it *prima facie status*. The account of Hoffman is for sausage; that of Horner for eggs, poultry, butter and a few plums,—articles likely to be used at the Grafton House. They are all receipted as paid by executors shortly after testator's death. Under these facts they seem just; and no wrong is done to the estate by their allowance. There is no error in overruling the exception as to them.

Appellants' Exception No. 11. As to \$83.85 paid for November, 1871; rent for Grafton House. Evidence shows, it was paid before testator's death, and it is to be disallowed. It was error to overrule this exception.

Appellants' exception No. 12. Twelve small charges, in all \$189.38. The executors exhibit receipts for most of these items and accounts of specification. They are in the list of debts, which Charles E. Hooper says he examined and believed to be just, and knew his father dealt with the parties. There is no denial of them by the other executor. Most, if not all of them, are allowed in said *ex parte* settlement, though for different sums arising from the fact, that Commissioner Hayden allowed no items arising after testator's death, whereas the accounts contain items dating since his death, and the commissioner in *ex parte* settlement so allowed them. Even before the statute making parties competent as witnesses, small items might be allowed to executor on his own oath. 2 Lomax, Ex'rs, p. 33 § 35; 2 Rob. Pr. (Old,) 367. This exception was properly overruled.

Appellants' Exception No. 13. Stock in agricultural and mechanical society, \$100.00. It was charged to executor in *ex parte* settlement. Charles E. Hooper alleges in his answer, that it was worthless, and in his deposition, that the executors "never received anything for it, and that he understood it to be worthless." There is no showing to the contrary. It is not such a *chose* as could be collected, so far as appears, by suit, nor is it shown to be salable. With respect to that part of the estate, which consists of *choses* in action, the law has long been settled, that, although debts of every description due to the testator are assets, yet the

executor or administrator is not to be charged with them, till he has received the money. 1 Williams, Ex'rs, s. p. 1509. The rule in West Virginia and Virginia is: "An executor is not to be charged with the debts due the estate of his testator at the time when they become due, but only at the time when he actually received them, except such debts are lost by his negligence or improper conduct." *Reitz v. Bennett*, 6 W. Va. 417; *Ecans v. Shroyer*, 22 W. Va. 581; *Cavendish v. Fleming*, 3 Mumf. 198. His account rendered under oath, is *prima facie* evidence of its truth. *Cavendish v. Fleming*, *supra*. This exception was properly overruled.

Appellants' Exception No. 14. Taxes on land. This land was devised to Sarah Hooper for life. The life-tenant must pay taxes. Tayl. Landl. & Ten. § 318. So the court held in this case. Code 1868, c. 29, s. 26 and Acts 1875, c. 54 provide: "Where the owner has devised the lands or a freehold estate therein absolutely, the assessor shall charge such land to the devisee." Mrs. Hooper's life-estate was a freehold, and she was chargeable with these taxes. Charles E. Hooper both in his answer and deposition states, that he paid taxes amounting to \$593.62, and tax-bills are filed as vouchers with reports in the cause. Can Charles E. Hooper set off these taxes paid by him against the claim of Sarah Hooper as legatee? Should he have credit for them under the circumstances of this case? I think they should be charged against her. She was bound for the taxes. He had funds of hers in his hands, probably all she had, and the relation of mother and son existed between them. The land was vested in her for life remainder in him and the other children. Is it not reasonable to say, that an understanding existed, that he should pay the taxes with money of the estate in his hands? Such payment inured to her benefit as well as the children's, he being one of them, and saved her estate as well as theirs from loss. True, one person can not, being a mere stranger, without request pay another's debt and hold him responsible. *Neely v. Jones*, 16 W. Va. 625. But the relation here existing was not that of mere stranger. Had Charles E. Hooper not paid, and the land been sold for the taxes, and he had bought, he being a remainder-man, probably he could not have held against her,

but he would hold the land in trust for her. It may be, that as remainder-man he would be entitled to apply money in his hands of hers to protect the remainder from loss by reason of non-payment of taxes.

But I do not place this position on these grounds. In her deposition Mrs. Hooper admits, that some taxes charged by Charles E Hooper against her as paid by him are just charges. These other taxes were charged by him under the idea, that they should be charged to the general fund whereas they were chargeable to her. She also says in her deposition : "I frequently paid Charlie money to pay taxes, but I do not know how much, or when." Thus it seems, that she knew the taxes were to be paid, recognized her obligation for them, and desired them paid, and that by the hands of her son. Is this not an implied consent, that he should pay them out of her funds in his hands? Having funds of hers in his hands and knowing, that she wished the taxes paid, was it not reasonable, that he should consider himself authorized by her to pay them, and just to her that he should pay them? And if she says other items of taxes were properly paid by him, why not also these? She does not deny, that he paid them. She gives no reason, why she should not pay them, specifies no ground, why they were not binding on her equally with other taxes. She says she paid him some money to pay the taxes but does not specify how much. We think this exception because of the allowance of these taxes was properly overruled.

Counsel on each side interprets Judge JOHNSON's expression as to this tax-matter as deciding it in favor of his side. I do not understand him as deciding it at all, further than that the taxes could not be charged in the account between the executors and the estate. He said : "Of course, the taxes on the real estate left to Mrs. Hooper by will are chargeable to her as life-tenant, not to the estate." He did not mean to decide either that they could or could not be set off as between the executors and Mrs. Hooper. If he did decide it, it was that she should be charged with them. Counsel contends that no amount of evidence would make these taxes a set-off in favor of the executor, because they are sued as executors, and this is a demand against Mrs.

Hooper individually, and thus the claims are not in the same right; citing 5 Rob. Pr. 976, and 2 Lomax, Ex'rs, 417. The latter lays down the rule thus: "A defendant, sued as executor or administrator, can not set off a debt due to him personally; nor, if sued for his own debt, can he set off what is due to him as administrator, because debts sued for and intended to be set off must be mutual and due in same right."

These principles refer to cases, where representatives are sued merely as such in their representative capacity for a demand against the estate, where they can not set off debts due to them individually; or where they sue for a debt due the estate, where their individual debts can not be set off. Not so here. Here the executors are sued, because they were executors for a fund in their hands due to legatees. It is not against the estate, but is a personal demand against the executors. 2 Lomax, Ex'rs, s. p. 400. The authorities cited relate to suits at law, not suits brought by legatees against executors for recovery of legacies, where the accounts between the parties are always adjusted. I see no reason, why in such a suit by a distributee or legatee for his share a debt due from him to the personal representative may not be set off. "Money lent and goods delivered by the executor to the legatee, it has been held, might be insisted on by the executor on a bill filed to recover from him the legacy as part payment." Id. 490. Moreover, it might not be going too far to say that under the circumstances such taxes should be treated not as offsets but as payments by the implied understanding of the parties.

Appellants' Exception No. 15. I do not think it reasonable to charge Charles E. Hooper with \$600.00 family board at the Revere House, as being contemplated by the parties, as his presence there was indispensable to the business, and he was giving his personal service, for which he could not charge, while his father did not give such service. Such would not be the case with any firm-funds used by him in paying services of a nurse or used for his family expenses. They would be chargeable to him on a settlement of the partnership account. But it would be a debt due the firm, and for reasons given above would be included in the partnership-balance. 7 Amer. & Eng. Cyclop. Law, tit. "Executors," XI. par. 6, p. 210, and note 5.

Appellees' Exception No. 1. Illinois lands. On the former appeal this Court adjudicated this question holding, that it should be charged to the executors. There was no error in overruling this exception.

Appellees' Exception No. 2. Items \$5.00 paid Casteel, \$100.14 to Simpson, Boyd & Co., \$28.00 to Trahern, \$3.95 to G. E. Jarvis, were allowed to executors in first *ex parte* settlement, and are therefore correct *prima facie* and have not been overthrown. Receipts for the first two are shown, and Charles E. Hooper swears to them in his deposition. S. Warfield item of \$141.54 is also allowed in said settlement. The account shows that \$134.29 of it was prior to testator's death. I do not construe Charles E. Hooper's answer as admitting, that it was after said testator's death, as suggested by counsel. He says: "If the following accounts [this being one] named in said bill were contracted before." The items of \$8.00 paid Shutt & Son for funeral expenses, \$40.00 to Miller for gas, and \$4.17 to John A. Cole, are sustained by evidence of Charles E. Hooper and are such charges as are probably correct. The said items of \$5.00, \$100.14, \$28.00, \$134.29, \$8.00, \$40.00, \$3.95, and \$4.17 should be credited to executors; and the court erred in wholly overruling them. The Simpson, Boyd & Co. item of \$108.10 should not be allowed. It was not in the *ex parte* settlement. There is no proof of it; and the account shows, that it comes from two items of \$46.80, dated December 13, 1871, and \$61.30, dated December 22, 1871,—both after testator's death. I see nothing to justify the allowance of \$63.00 paid to John M. Rogers. It was error to wholly overrule this exception.

Appellees' Exception No. 3. This exception was sustained as to \$30.10, goods bought at sale by Mrs. Hooper, and executors were allowed that. She received the benefit of these items. They were such as she needed on the farm and are probably correct and are sustained by Charles E. Hooper's deposition. The other items, as will appear from Statements C and 9, were allowed to executors except \$56.25 insurance. Statement 9 gives executors credit for these items except insurance after crediting Mrs. Hooper with \$180.00 collected from Doll. I see nothing to justify charging \$56.25 insurance to Mrs. Hooper. She did not authorize the pay-

ment. The court did not err in overruling Exception No. 3 as to that item. It allowed executors the other items, though their counsel do not so understand it.

Appellees' Exception No. 4. I do not think the evidence justifies the charge of \$400.68 to Harry B. Hooper, and there was no error in overruling this exception.

Appellees' Exception No. 5, as to \$2,544.50 in Martinsburg bank. William S. Hooper says it was all checked out by Charles E. Hooper, but the checks on that bank were signed by both of them, and I do not see, that to their extent the money was chargeable solely to Charles E. Hooper. The report seems erroneous as to this. But as yet there has been no decree as between the executors. Nothing has yet been decreed to William S. Hooper's assignee, Whitescarver, or to Charles E. Hooper. Legatees must be paid as against both of them, before they can get anything, no matter which received the assets, as one is surety for the other. *Hooper v. Hooper*, 29 W. Va. 277 (1 S. E. Rep. 280). This matter is not important, and may never be.

Appellees' Additional Exceptions, marked "N." Exceptions Nos. 1 and 2. Properly overruled. There is no evidence to charge Mrs. Hooper with any part of the \$1,508.18 unsold property at the Grafton House. The preponderance of evidence is against any agreement between her and her sons to continue business there at least of such character as to charge her with waste of the property.

Appellees' Exception, No. 4. Properly overruled, as report charges William S. Hooper with \$725.00.

Exception No. 5. There should have been a stated account between the executors for purposes of a decree as between them.

George M. Whitescarver excepted because the commissioner did not report him as assignee of W. S. Hooper entitled to the same amount as reported in favor of Harry B. Hooper. This exception is not well taken. William S. Hooper as an obligor in the bond is a surety, and he or his assignee can not get anything, until other legatees are paid in full. Harry B. Hooper was not on the bond. But the court never acted on this exception nor rendered any decree as to the rights of Whitescarver.

The decree is to be reversed with costs, and cause remanded for further proceedings in accordance with principles herein indicated, and further according to principles governing courts of equity.

REVERSED. REMANDED.

WHEELING.

STATE v. TINGLER.

Submitted June 14, 1889.—Decided June 26, 1889.

1. CERTIORARI.

On suggestion of diminution of the record a writ of *certiorari* is effectual to bring to this court the true and correct record, no matter in what respect the transcript, as certified in the first instance, may vary from or misrepresent such record.

2. INDICTMENT—FORGERY—CRIMINAL PRACTICE.

The form of the indictment for forgery and uttering forged instruments, found in Mayo's Guide, (Ed. 1860,) p. 537, is good as to both counts.

3. INDICTMENT—FORGERY—CRIMINAL PRACTICE.

Neither in an indictment for uttering or attempting to employ as true a forged instrument, nor in one for forgery is it necessary to name the person intended to be defrauded, as the Code of 1887, c. 158, sec. 8, dispenses with that in both such cases.

4. INDICTMENT—FORGERY—CRIMINAL PRACTICE.

It is not necessary in such indictment to allege, that the act was to the prejudice of another's right; but it must appear from the description of the writing in the indictment, that it is such as might prejudice his right.

B. F. Ayres for plaintiff in error.

Attorney-General Alfred Caldwell for the State.

BRANNON, JUDGE:

Writ of error to a judgment of the Circuit Court of Ritchie county sentencing Tingler to confinement in the penitentiary for two years. A preliminary question arises upon a motion by defendant to dismiss a writ of *certiorari* awarded in this

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cause. The transcript of the record accompanying the petition for the writ of error states, that the grand-jury presented "an indictment against Thomas Tingler for a misdemeanor. A true bill." The Attorney-General suggested a diminution of the record, and this Court awarded a writ of *certiorari* to the clerk of the Circuit Court of Ritchie, and the record as certified by him under the mandate of said writ shows, that the grand-jury presented "an indictment against Thomas Tingler for a felony. A true bill." The defendant below moves this Court to quash this writ of *certiorari*. His counsel cites the provision in sec. 7, c. 135, Code 1887, that "such court may in any case award a writ of *certiorari* to the clerk of the court below, and have brought before it, when part of a record is omitted, the whole or any part of such record.

Certiorari, as an auxiliary writ used by appellate courts to present to them for decision of errors assigned the record in the court below, as it in truth exists there, is a remedial writ belonging to such courts under the common-law without this statute, and its office should not be hampered by too strict construction. If counsel means by citing the statute, that it does not lie in this case, because the statute gives it, "when part of the record" is omitted, and because the transcript, as it first appeared, showed the indictment to be for a misdemeanor and was full on this point, I do not think the point well made. The Attorney-General suggested, that this word "misdemeanor" in the transcript was a clerical error, and that in the record-book it was in truth "felony," not "misdemeanor." Literally, if such is the fact, here is a part of the record omitted in the language of the statute,—the word "felony,"—and the statute would apply. Certainly, where the clerk by accident in making the copy substitutes one word for another found in the record, the spirit and object as well as the letter of this act, as well as the common-law function of the writ, would seem to afford a remedy, whereby the record, as in truth it is, can be brought to this Court a better record. In *Shifflet v. Com.*, 14 Gratt. 652, where there appeared an omission in the transcript of the finding of the indictment, a *certiorari* was held proper to secure a better record. So in *Williams's Case*, 14 W. Va. 869.

If a record is defective or incorrect, the errors or omis-

sions should be suggested in this court, and a *certiorari* moved to bring up a correct record. *Hudgins v. Kemp*, 18 How. 530. "Where the clerk's certificate to the transcript is in point of fact not true, the remedy is by *certiorari* to supply deficiencies," says WAITE, C. J., in *Railroad Co. v. Dinsmore*, 108 U. S. 30 (2 Sup. Ct. Rep. 9). In short this writ is properly used by this Court to get before it the record of the court below, as it in fact exists, no matter what the character of the defect in the transcript as certified in the first instance here.

Defendant's counsel relies on *Seabright's Case*, 2 W. Va. 591, which holds, that the purpose of the writ is not to cause a record to be made or corrected but to have brought before the appellate court, when part of the record is omitted, the whole or any part of it. That case does not apply here. There after signing the bill of exceptions the judge during the term had interpolated certain words, and the defendant asked a *certiorari* with the intent to have the bill certified, as it was before the interpolation of those words, and, the facts being agreed, this Court held, that the court below had the right to insert those words; and the real point of the decision was, that the record as already before the court was correct and true, and refused the writ. Judge MAXWELL remarked that a *certiorari* could not be used to cause a record to be made or corrected. This is so. Its office is only to bring up the record as already made by the court below. Any amendment or correction of that record is to be made by that court in a proper proceeding. *Vest's Case*, 21 W. Va. 796; *Bias v. Floyd*, 7 Leigh, 647. A *certiorari* will not do this. But in this case the State by the *certiorari* is not seeking to alter, amend or correct the record from its present showing, as it now is in the Circuit Court, but simply to present it here as it is there. The motion to quash the *certiorari* is overruled.

The indictment is as follows: "State of West Virginia, Ritchie county, to wit: The grand-jurors of the State of West Virginia, in and for the body of the county of Ritchie, and not attending said court, upon their oaths present that Thomas Tingler, on the——day of——, 1888, in said county, feloniously did forge a certain paper-writing, pur-

porting to be an order signed by——MacFadden, and to solicit Mr. Collins to let the bearer have three dollars' worth of goods, and which said forged order is of the following purport and effect, to wit: 'Feb. the 23, 1888. Mr. Collins: Please let the bearer have three dollars' worth of goods, and oblige me. I will pay you in tobacco. MACFADDEN.' With intent to defraud against the peace and dignity of the State. *Second Count.* And the jurors aforesaid, on their oaths aforesaid, do further present that the said Thomas Tingler afterwards to wit, on the——day of——, 1888, in said county feloniously did utter and attempt to employ as true a certain paper-writing, purporting to be an order payable to bearer, which said last-mentioned order is of the following purport and effect, that is to say: 'Feb. the 23, 1888. Mr. Collins: Please let the bearer have three dollars' worth of goods, and oblige me. I will pay you in tobacco. MACFADDEN.' With intent to defraud, he the said Thomas Tingler, at the time he so uttered and attempted to employ as true the said last-mentioned forged order and paper writing, to wit, on the day and year last aforesaid, well knowing the same to be forged, against the peace and dignity of the state. On information of Creed Collins and William MacFadden, sworn and sent to the grand jury to give evidence at the instance of the state. H. PECK, Pros. Atty. Indorsed: A true bill. J. M. MACKINNEY, Foreman."

Defendant moved the court to quash the indictment and each count, and his motion was overruled. He then pleaded not guilty and was tried by a jury, and a general verdict of guilty as charged in the indictment was rendered. He moved the court to arrest judgment and grant him a new trial, because the verdict was contrary to law and evidence. The court overruled the motion and pronounced the said sentence, and he excepted.

The bill of exceptions shows, that the State proved by Creed Collins, that the order was presented to him at his store in Ritchie county by the prisoner about the time of its date, who said, that his name was Thomas Campbell, and that the order presented signed "MACFADDEN" was given to him by William MacFadden for work; that Collins gave prisoner

three dollars in goods for the order and charged them to MacFadden, who afterwards refused to pay the same because he had not given the order, and that he (Collins) had lost the amount of the order, three dollars.

The State introduced the order set out in the indictment and proved by William MacFadden, that the name of the prisoner was Thomas Tingler; that he, MacFadden, was not indebted to Tingler at the time, when the order bears date; that he did not write or sign the name "MACFADDEN" thereto, and did not authorize any one to do so, nor did he ever recognize it as good, but refused to pay it to Collins, and Collins lost three dollars thereon. MacFadden on cross-examination stated, that, since he first had knowledge of the existence of the order, he had said, if prisoner had paid him \$100.00 he would not have prosecuted him; that he meant by that, that he would have avoided going before the grand-jury. He said he was the only William MacFadden in Ritchie county.

The State proved by Hallam, that prisoner had been in his custody as jailer upon this charge; that he was not kept locked in the cell but was permitted to be at large in the room containing the cells or cages; that the door of the room was not locked, but propped with an iron poker from the outside; that prisoner pried one of the hinges of the door loose and escaped and was gone three months. A reward was offered, and he was captured by a man named Frey. An account was shown witness in his favor against the State, sworn to by him, for criminal charges, charging for receiving and discharging this prisoner at date of escape, and he admitted swearing to the account, stating that he was mistaken, and should have charged only for receiving the prisoner.

Treating, as we must, the record of the finding of the indictment as correctly shown by the record sent up by the clerk under the *certiorari*, there is nothing to sustain the motions to quash and in arrest of judgment, so far as they rest on that point.

Is the indictment good in both counts? We think it is. The prisoner's counsel argues, that the second count is bad because it does not specify the person to be defrauded. The counsel admits, that the first count, though it does not name

such person, and though bad at common-law, is good under the Code, 1887, c. 158, sec. 8, providing that "where an intent to injure, defraud, or cheat is required to constitute an offence, it shall be sufficient in an indictment or accusation therefor to allege generally an intent to injure, defraud and cheat without naming the person intended to be injured, defrauded or cheated;" but contends, that the second count, that for uttering, is not helped by this statute. We do not concur in this view. We think, that such intent exists in the uttering and employing as true a forged instrument, knowing it to be forged, as much as in the act of forging it. In *Henderson's Case*, 29 W. Va. 147, (1 S. E. Rep. 225) the count for uttering did not charge, whom it was intended to defraud, though it did charge to the prejudice of Leonard, and it was held good. So in *Koontz's Case*, 31 W. Va. 173 (5 S. E. Rep. 328) the indictment was held good, though it did not name the person to be defrauded. This indictment is in the form found in Mayo's Guide, which has for many years been used in both Virginias.

In assigning errors the prisoner's counsel points out as a defect in the indictment, that it does not allege, that the act was to the prejudice of any one's right. *Powell's Case*, 11 Gratt. 822, is a full answer to this point. There it was held, that the words "to the prejudice of another's right," found in the statute against forgery, need not be used in the indictment, because they are descriptive not of the offence but of the instrument. Having specified various instruments as subjects of forgery, it being impossible to specify all, section 7 provides; "If a person forge any writing other than such as is mentioned in the first and third sections of this chapter, to the prejudice of another's right," plainly intending by these words to describe or characterize the writing not the act. If the instrument itself be of such character, as may prejudice another's right, that is enough. There is no error therefore in overruling the motion to quash and in arrest of judgment.

Was there error in refusing a new trial? Prisoner's counsel urges, that the evidence does not show, that the forgery was committed in Ritchie county. The prisoner in Ritchie county has the order in his possession and passes

it about the date of the order. If he forged it, why may it not be said, that he forged it there? In *Poindexter's Case*, 23 W. Va. 805, this Court held, that on a trial for forgery, if it be proved, that the writing was found in the hands of the prisoner in the county, where he uttered or attempted to employ it as true, and there is no evidence, that the forgery was done in another county, the jury may infer from these facts, that the forgery was committed in that county. In *Spence's Case*, 2 Leigh, 751, the court held, that evidence, that the prisoner had the note in his possession in a county was proper evidence to go before the jury of the fact, that he committed the forgery there. See 3 Greenl. Ev. § 112. The jury having found against the prisoner as to this point, it being the judge of the weight of the evidence, this Court can not find otherwise, unless we consider the evidence manifestly insufficient. But the verdict, it may be added as pertinent to this point, is general. It finds the prisoner guilty of uttering and employing the order as true as much, as it finds him guilty of forgery, and this certainly occurred in Ritchie. This consideration would render the question of the place of the forgery immaterial, even if there were anything of substance in it.

We are of opinion, that the evidence justifies the verdict. Judgment is to be affirmed.

AFFIRMED.

WHEELING.

JOHNSON v. MACCOY.

Submitted June 6, 1889.—Decided June 26, 1889.

1. SUMMONS—REVERSAL OF JUDGMENT.

A summons issued by a justice in a civil suit is served by delivery of a copy to the defendant by a private individual, as shown by his affidavit. Defendant does not appear, and judgment is given against him. He then takes an appeal to the Circuit Court. In that court he moves to quash this return, on the ground that the person so serving had not been appointed a

special constable, and the court overrules the motion to quash. Defendant then makes full defence before a jury, and there is judgment upon the verdict against him for \$107.85. Under the facts of this case this Court will not reverse the judgment for the overruling of the motion to quash the return.

2. SUMMONS.

Quere, can a summons issued by a justice be served by a credible person, though not an officer, he verifying his return by an affidavit?

3. CLERK OF CIRCUIT COURT—FEES.

A clerk of a Circuit Court may maintain an action for his fees without first having placed them in an officer's hands and had them returned, "No property found."

T. P. R. Brown for plaintiff in error.

J. Bassell for defendant in error.

BRANNON, JUDGE:

Isaac V. Johnson brought an action before a justice in Barbour county against Benjamin MacCoy to recover money due by note and fee-bills in favor of Johnson as clerk of the Circuit Court of Barbour. MacCoy did not appear, and, judgment having been rendered against him, he took an appeal to the Circuit Court, where judgment was rendered against him, and he obtained this writ of error.

He assigns two errors only. The first is, that the court overruled his motion to quash the return of the service of the summons upon him. This service is shown by an affidavit made by W. T. Robinson "that he executed the within summons on the defendant, Benj. MacCoy, by delivering to him in person a true copy thereof on the 10th day of December, 1885." The assignment of errors argues, that there was no evidence, that Robinson had been appointed a special constable. I do not see that this argument has any force. He does not return it as special constable but makes affidavit of service. The Code, § 17, c. 50, provides, that process may be directed to a constable, and § 30 provides, that a special constable may be appointed to serve process, and the process may be directed to him; and § 32 provides, that process may be served on the defendant by delivering him a copy. Section 2, c. 124, provides, that process from any court may be served by any credible person, and his return may be verified by

affidavit; and section 1, c. 121, provides, that any notice may be served by any credible person.

It might with force be argued, that justice's process can be served not only by a constable or special constable but also by a credible person though not an officer; that the provision in the chapter relating to justices contemplating service of process by constables is only one method, and that the service by a credible person under said chapter 124 may also be resorted to; that these provisions all in the one Code are in furtherance of the remedy and ought to be liberally applied as a means to bring suits to hearing. A judgment may be had in the Circuit Court for any amount, however large, upon a service by any credible person verified by his affidavit; yet, as appellant contends, a judgment for a cent could not be rendered by a justice on a precisely similar service. This would be a singular anomaly, if true. The justice's statute does not in terms limit the service to constables. But we do not think it necessary to place our ruling on that ground. The object of service of process is to give a defendant notice of the suit. In this cause, if we may read the return, the defendant had the benefit of the best mode of service,—a delivery into his own hands of a copy of the summons. He next appears after judgment and takes an appeal; and thus it appears, he had notice of the suit. He then comes into court, appears in the suit, and moves the court to quash the return. Had the court quashed it, it would not have dismissed the suit, but simply awarded an *alias* summons to be the next moment served; for it would *not* have been sent to rules and served for what purpose? Simply to give him notice of the suit, which notice he already had. Upon the overruling of his motion to quash he asked no continuance, and a jury was sworn in the case, and the defendant availed himself of the proceeding to make a defence, has had a fair trial, and now asks this Court to reverse all these proceedings, not on a ground going to the merits, but on a dilatory, technical ground, and only to give him what he has already had,—another trial before a jury. This would seem to be sacrificing substance to a dry technicality. What injustice has been done the defendant by reason of this return? No injustice has been done the defendant, but sub-

stantial justice promoted by our ruling on this point. This doctrine may be too liberal for a formal suit in a Circuit Court, where upon a return quashed the cause is sent to rules for proceedings there, but this case was a case before a justice, and to it liberal rules both before the justice and court should be applied in a line to attain justice.

The second error assigned is, that the Circuit Court allowed the plaintiff to introduce and prove fee-bills due from the defendant to the plaintiff as clerk of the Circuit Court of Barbour county. The appellant bases his objection to the introduction and proof of these fee-bills on the ground, that they had never been placed in the hands of an officer for collection and had no return on them by an officer showing his inability to collect them; and he cites to support this position the case of *Craigen's Ex'x v. Lobb*, 12 Leigh, 627, in which the syllabus is: "Though no action lies for clerk's fees till they shall be put into an officer's hands for collection, and he has returned that they can not be levied by distress, yet the clerk may set them off against an action on his bond to the party from whom they are due." That decision was based on a statute in the Code of 1819 expressly providing, that no action shall be had or maintained for clerk's fees, unless the sheriff should return, that the person owing such fees had not sufficient property within his bailiwick. That statute has long since been repealed. No provision prohibiting action for clerk's fees until a return by an officer is now in our statute-law. Under the common-law he may sue for his fees, as any one else performing work and labor, and recover what the law prescribes for the particular services. The statute, which allows a clerk to issue and levy fee-bills, is only a cumulative remedy for speedy collection, and does not take away the right to the common law suit. The Code, c. 137, § 31, as found in Acts 1882, c. 129, in force, when this suit was brought, expressly recognizes the existence of, if it does not impliedly give, both remedies by suit and action, by the language: "No fee shall be collected by distress or suit after two years from the end of the year, in which the service was performed, that is charged therein, unless within two years before the institution of such proceeding it was returned by an officer, with such in-

dorsement thereon (properly dated) as is mentioned in the preceding section." The function of the latter clause is not to prohibit suit or distress in all cases, until there shall be a return of "No property found," but to save the right of collection notwithstanding the lapse of two years in cases, where within two years before the suit or distress the fee-bill had been so returned. The second assignment of error is not tenable.

The judgment is to be affirmed with damages and costs to appellant.

AFFIRMED.

WHEELING.

LORENTZ v. LORENTZ.

*(BRANNON, JUDGE, absent.)

Submitted June 11, 1889. —Decided June 26, 1889.

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1. BILL OF REVIEW—DEMURRER.

Where a bill of review is filed to review and reverse a decree on the ground of newly-discovered evidence, and the bill on its face shows, that the facts stated as relied upon are immaterial and irrelevant, the bill should be dismissed on demurrer.

2. BILL OF REVIEW.

Where errors apparent on the face of the decree are relied on in the bill of review to reverse the same, it is not allowable to look into the evidence in the case to show, that the decree is not supported by the facts proven.

L. Bennett for appellant.

C. C. Higginbotham for appellees.

ENGLISH, JUDGE :

On the 4th day of December, 1882, Jacob Lorentz applied to the Circuit Court of Braxton county for leave to file a bill of review, to reverse two decrees pronounced in this cause,—

*Rendered judgment below.

one on the 21st day of December, 1879, and the other on the 23d day of March, 1880, by said Circuit Court, in which bill certain errors of law were relied upon as existing in the decrees complained of. The plaintiff also alleged, that, since the decree complained of was rendered, he has discovered testimony unknown to him before that time, which would establish beyond dispute the fact, that he, plaintiff, was to have all the unsold land on Bridge run for a certain consideration therein set forth; that the discovery of the witness was accidental, and that by all the diligence in his power he could not have discovered the testimony to be used in said cause before the decree; that the witness was Perry C. Lorentz, whose affidavit was filed as part of said bill of review; in consideration whereof the said Circuit Court of Braxton county granted leave to file said bill as a bill to review said decree pronounced on the 23d day of March, 1880, and refused leave as to said decree of the 21st day of August, 1879; and said bill was accordingly filed as a bill to review said decree of the 23d day of March, 1880, and said bill was sent to rules with leave to sue out process thereon and to mature the same for hearing, and afterwards the original cause and the bill of review were transferred to the Circuit Court of Upshur county, there to be docketed in said court and to be determined and tried.

The defendant, Miffin Lorentz, appeared and demurred to the plaintiff's bill of review and also filed an answer thereto, and some depositions were taken for both plaintiff and defendants upon the questions of fact raised by said bill, and on the 11th day of February, 1885, a decree was rendered by the said Circuit Court of Upshur county dismissing the plaintiff's bill; and, although the decree does not in express terms pass upon the demurrer, the effect thereof is to sustain the same, the decree having been in favor of defendants.

In the case of *Nichols v. Heirs of Nichols*, 8 W. Va. 175, we find, that this Court held in the seventh point of syllabus, that when a bill of review is brought upon new matter or evidence, and the defendant thinks it is not relevant, he may demur; and in the eighth point of the syllabus, that upon a bill of review for errors apparent upon the face of the decree it is not allowable to look into the evidence in the case

in order to show the decree to be erroneous in its statement of the facts; and, if the decree does not contain a statement of the facts, on which it is based, there can be no relief by bill of review. Looking to the bill of review under consideration we find, that the errors complained of in the decrees sought to be reviewed are not errors of law but depend upon the facts sought to be proved in the original cause, and it would be necessary to look into the evidence taken in said original cause, before we could determine, whether error existed or not.

The plaintiff also seeks to review said decrees on the ground of the newly-discovered evidence, which is set forth in the affidavit of Perry C. Lorentz, which is filed with and made part of said bill; but on looking at said affidavit of said Perry C. Lorentz in connection with the allegations of the bill we find, that the newly-discovered evidence consists of declarations made by Jacob Lorentz, Sr., before and after the execution of the deed for the Bridge Run property in the bill mentioned, and in order to admit such testimony the instrument must be attacked on the ground of undue influence in obtaining the same, or incapacity in the grantor. In the case of *Dinges v. Branson*, 14 W. Va. 100, this Court held "that the declarations of a testator or grantor made either before or after the execution of the instrument are admissible evidence, where the issue involves the mental capacity of the testator or grantor, at the time the instrument was executed, or that undue influence was exercised over him at that time;" and these, it is believed, are the only instances, in which such declarations can be proven, unless made at the time the instrument is executed.

The evidence then, which the plaintiff claims he has discovered, is immaterial, and the bill can not be sustained on that ground; and, even if there were any errors in law set forth in the bill, which would ordinarily entitle the plaintiff to review said decree, it having been brought to the attention of the court below, that the plaintiff had applied to this Court for an appeal from the decree complained of, which appeal had been refused, because this Court was of opinion, that the decree complained of was plainly right, the court below acted rightly in dismissing said bill. See the case of

Moore v. Johnson, 24 W. Va. 549, where it is held, that "where the Supreme Court of Appeals rejects an application for an appeal from a decree of the Circuit Court, on the ground that the decree complained of is plainly right, no other petition therein can be afterwards entertained; and if an appeal from the same decree or from one based solely upon it, and which simply carries it into execution, should afterwards by inadvertence be granted by said court, on the hearing of the case the appeal so inadvertently granted will be dismissed as improvidently awarded." It seems to me, that the demurrer to said bill of review should have been sustained, and the bill dismissed; but, the same conclusion having been reached by the court below upon the hearing, the decree is affirmed, with costs to the appellant.

AFFIRMED.

WHEELING.

OGDEN v. CHALFANT.

*(GREEN, JUDGE, absent.)

32	559
52	354
32	559
59	406

Submitted June 20, 1889.—Decided June 23, 1889.

1. RECEIVERS.

In a suit pending to subject lands to the payment of liens thereon the court in a proper case may appoint a receiver to take charge of the lands and rent the same, until a sale can be made.

2. RECEIVERS.

A receiver may be appointed in such case, whenever it is shown in any proper manner, that the debtor is insolvent, or that the lands are likely to prove insufficient to satisfy the undisputed or ascertained liens thereon.

3. RECEIVERS—NOTICE.

Where the motion is made in term-time in a pending suit, no notice to the debtor is necessary.

J. P. Clifford for appellants.

J. Bassell for appellee.

*On account of illness.

SNYDER, PRESIDENT :

Suit brought by Selden M. Ogden against John Chalfant and others, in the Circuit Court of Harrison county. The suit was originally to enforce the lien of the plaintiff's judgment against the real estate of the defendant John Chalfant, but, it appearing from the bill, that there were other liens upon said real estate, an order was made referring the cause to a commissioner, with directions to convene all the lien-creditors by publication and to ascertain and report all the liens on said real estate together with their amounts and priorities, and thus the suit was converted into a general creditors' suit and thereafter was prosecuted as such.

The bill alleges, that the said Chalfant has no personal estate, and the commissioner convened all the lien-creditors and reported a large number of debts amounting to over \$20,000.00 as liens upon said real estate. This report was recommitted, and a second report made by the commissioner showing an increased amount of liens; and by an order made May 30, 1887, the court again recommitted the report. A. P. Sturm, a judgment-creditor of said Chalfant, whose debt appears in said report, gave written notice to Chalfant, that he would move the court on May 25, 1887, to appoint a receiver to rent a part of the lands mentioned in the bill and proceedings, and filed in the cause an affidavit of the insolvency of said Chalfant. Two affidavits were filed by said Chalfant, in one of which it is stated, that he had leased eighty six acres of said land to Solomon H. Chalfant for the season of 1887, and in the other it was stated, that lands in the hands of tenants generally deteriorate and become less salable. On June 2, 1887, the court made an order in the cause, appointing the sheriff of the county a special receiver to take charge of a part of said lands and rent the same until March 1, 1888, but ordered the receiver not to take possession of the eighty six acres of land, which had been rented, until the term of the tenant should expire.

It is from this order that the defendant John Chalfant and the said Solomon H. Chalfant have obtained this appeal.

It is assigned as error, that the court had not sufficient *data*, upon which to base an order appointing a receiver. Pending a suit to subject a debtor's real estate to the payment

of liens upon it, the court may sequester the rents and profits of such real estate, and appoint a receiver for that purpose, whenever it appears, that the debtor is insolvent. *Grantham v. Lucas*, 15 W. Va. 425; *Beard v. Arbuckle*, 19 W. Va. 145.

In this case the bill alleged that the debtor had no personal estate; and there was an affidavit, that he was insolvent. These facts are not only not contradicted, but they are virtually admitted; and besides, the whole proceedings in the cause show, that this was a cause, in which it was eminently proper for the court to take charge of the lands and rent them, until a sale could be had. There seems to have been much delay and difficulty in ascertaining and adjusting the numerous liens upon the lands. Two reports had been made, and the court found it necessary to order a third report. It is not essential, that there should be a report of the value of the lands or the amount of all the liens, in order to warrant the court in sequestering the property. Whenever it is shown in any proper manner, whether by the report of a commissioner or other sufficient proof, that the debtor is insolvent, or that the lands are likely to prove insufficient to pay off the undisputed or ascertained liens thereon, any lien-creditor, who is a party to the proceeding, is entitled to have the lands sequestered, until a sale thereof can be made. In this case all these requisites appeared, and therefore there were sufficient *data* for the appointment of a receiver.

It is further claimed, that A. P. Sturm, on whose motion the receiver was appointed, was not a party to the suit; and that therefore he was not entitled to make said motion. While Sturm was not made a formal party to the bill, he was in fact a party to the suit. He was one of the creditors convened, and the report of the commissioner showed, that he filed in the cause a large judgment in his favor against the debtor John Chalfant. This under the repeated decisions of this Court made him a party to the suit. *Neely v. Jones*, 16 W. Va. 625; *Arnold v. Casner*, 22 W. Va. 444.

It is also insisted for the appellants, that the notice was irregular and insufficient. The order appointing the receiver was made in a pending suit fully matured for hearing; and, as the parties were already in court, no notice was necessary. In *Grantham v. Lucas*, and *Beard v. Arbuckle*, *supra*, there

was no notice of the motion, and I have been unable to find any case, in which notice of the motion was required. It therefore follows, that no injury could have resulted to the appellants from the defects in the notice, because no notice was required.

I have now considered all the errors assigned, and for the reasons stated none of them are tenable. The decree of the Circuit Court is affirmed.

AFFIRMED.

WHEELING.

CORROTHERS v. JOLLIFFE.

Submitted June 6, 1889.—Decided June 27, 1889.

1. PARTITION—SALE.

In a suit for the partition of a mill-property, which is not susceptible of partition in kind, the plaintiff, who is the owner of one sixth of the property, offers for the whole \$5,000.00 and claims, that it is worth more than that sum, and the court at the instance of the defendant, who owns the other five sixths and states, that he does not wish to sell, and offers to pay the fair value of the plaintiff's interest, refers the cause to a commissioner, who reports the value of the plaintiff's interest at \$550.00. *Held*: It was error for the court to decree that upon the payment of said \$550.00 the plaintiff should convey his interest to the defendant. Instead of such decree the court should have ordered the whole property to be sold at auction.

J. W. Mason and *A. F. Haymond* for appellant.

No appearance for appellee.

SNYDER, PRESIDENT :

Suit in equity commenced in December, 1882, in the Circuit Court of Monongalia county by John W. Corrothers against Thomas M. Jolliffe and others and subsequently removed to the Circuit Court of Taylor county, where it was finally heard and decided. The facts as they appear in the

record, so far as it is necessary to state them for the purposes of this appeal, are as follows :

Prior to July, 1882, six of the children of Joseph Jolliffe, deceased, were the joint owners of certain real estate in Monongalia county, consisting of about twenty one acres of land, on which there were a mill and other buildings with certain water-rights appurtenant thereto. One of these six children was the defendant, Thomas M. Jolliffe, and another was his sister, Catherine A. Hutchinson, who in July, 1882, sold and conveyed her undivided one sixth interest in said property to the plaintiff, John W. Corrothers. In December, 1882, the defendant, Thomas M. Jolliffe, purchased and had conveyed to him the interests of four of said children, whereby he became the owner of the five sixths, and the plaintiff the owner of the other one sixth of said property. The bill alleges, and the answer admits, that the property is not susceptible of partition in kind. The bill prayed for a sale of the property and a division of the proceeds according to the respective interests of the parties. The defendant Thomas M. Jolliffe states in his answer, that he does not wish to sell his five sixths interest in the property, and avers and offers to pay the plaintiff for his one sixth interest whatever sum three disinterested men will say it is worth, or whatever the court by reference to a commissioner may ascertain to be the value of the plaintiff's one sixth interest. In reply to this claim and offer of the defendant the plaintiff stated, that he also wished to buy the property, and was willing to pay the said defendant the fair value of his five sixths, to be ascertained as suggested by the defendant, and denies, that because the defendant is the owner of the larger interest he has the right to purchase the property to the exclusion of the right of the plaintiff to purchase.

Upon this state of facts the court made an order, in which it decided that the defendant was entitled to purchase the one sixth interest of the plaintiff, and referred the cause to a commissioner to ascertain the value of said one sixth interest. The commissioner took depositions as to the condition and value of the property and reported, that the value of the plaintiff's one sixth was \$583.00 and he also returned with his report the offers of two responsible persons to pay

\$1,100.00 and \$1,150.00 respectively for said one sixth interest. On exceptions by the plaintiff the cause was referred to another commissioner, and he reported, that the said one sixth interest was worth \$550.00. Upon the final hearing of the cause the plaintiff repeated an offer previously made by him to pay the defendant \$4,166.69 for his five sixths interest in the property and brought said sum into court and tendered it for such payment; but the court refused to consider said offer, and decreed that the defendant pay to the plaintiff \$550.00 in full satisfaction of his one sixth interest, and in consideration thereof ordered the plaintiff to convey said interest in the property to the said defendant.

From this decree, which was entered on August 11, 1886, the plaintiff has appealed.

Our statute declares: "When partition can not be conveniently made, the entire subject may be allotted to any party who will accept it, and pay therefor to the other parties such sums of money as their interest therein may entitle them to; or, in any case in which partition can not be conveniently made, * * * the court may order a sale of the entire subject, and make distribution of the proceeds of sale according to the respective rights of those entitled," *etc.* Code 1887, c. 79, s. 3. Under this provision of the statute, when partition in kind can not be conveniently made, the court may do either of two things: *First*, it may allot the entire subject to a party, who will accept it; or, *second*, it may order the whole subject to be sold; but whether the court should in any particular case adopt one or the other of these modes of proceeding must depend upon the circumstances of the case. In a case such as the one now before us, where there are but two parties, and each of them desires to have allotted to him the whole subject, the court can not arbitrarily decide, that one shall have the subject to the exclusion of the other.

The fact, that one has a greater interest than the other, is surely no just reason, why he should be given a right of election, which is denied to the other. In principle the owner of the small interest has as much right to control and protect his interest, as the owner of the large interest has to control and protect his interest. The difference between the

two interests is merely one of degree, and not of principle. The small interest of the one may be a much larger proportion of his whole estate than the large interest is to the whole estate of the owner of that interest. A man, who owns one acre of land, is in law and justice entitled to the same rights in respect to it, that a man who owns 100 acres is in respect to his 100 acres. The language of the statute is not, that the owner of the larger interest may elect to have allotted to him the whole subject upon the payment to the owner of the smaller interest the value of the latter, but that the entire subject may be allotted to any party regardless of his interest, who will accept it. In a case where more than one party, as in the case at bar, asks the court to allot the whole subject to him, and he is able and willing to pay for the other interests, both reason and justice require the court in the exercise of its powers to allot the whole to the party, who offers the largest proportional sum for the whole or the interests of other parties. It would be unjust in such cases to allot the whole to the party, who was unwilling to pay to the other party or parties as much or more proportionally for their interests as they were willing and able to pay him for his interest, and it would be equally unjust for the court to compel a party to accept for his interest less than he was ready and willing to pay for the like interests of the other parties. In such case the only proper mode of proceeding is for the court either to allot the entire subject to the party, who offers the largest proportional price for it, or to order the sale of the whole.

If, however, only one of the parties is willing to have the whole allotted to him, and the other parties are unwilling to take for their interests what such party is willing to pay therefor, then the court may either refer the matter to a commissioner to ascertain the fair value to be paid for said interests, or order the whole subject to be sold, as the one or the other course may seem to the court to be the most advisable and promotive of the interests of all the parties in interest.

In the case at bar the plaintiff offered to pay the defendant \$4,166.67 for his five sixths of the property. This was equivalent to an offer of \$833.33 for a one sixth interest, and

in the face of this offer the court decreed that the plaintiff should have only \$550.00 for his one sixth interest. The effect of this decree was to confiscate at least \$283.33 of the plaintiff's property, or to transfer it to the defendant arbitrarily and without compensation. But this was not all. The plaintiff was offered a much larger sum than \$833.33 for his interest, and stated that he expected to pay the defendant more than that sum for each of the defendant's sixth interests, in the event the entire property should be sold at public auction.

In view of these and other facts appearing in the record, it was the plain duty of the court to order the entire subject to be sold at auction. For these reasons I am of opinion that all the decrees of the Circuit Court should be reversed, and the cause remanded to said court, to be there proceeded in according to the principles announced in this opinion.

REVERSED. REMANDED

WHEELING.

BOGGS v. BODKIN.

*(BRANNON, JUDGE, absent.)

Submitted January 17, 1889.—Decided June 27, 1889.

1. SPECIFIC PERFORMANCE—PAROL CONTRACT—APPEAL.

A written contract is entered into for the exchange of lands and it is so far executed, that each party puts the other in possession of the lands exchanged, but deeds are not executed to complete the exchange. The parties then entered into an executory parol contract, whereby they annul the first contract of exchange, and it is put into effect partially by one of the parties restoring to the other the possession of his land. The court will enforce such contract of rescission thus partially executed.

2. SPECIFIC PERFORMANCE—PAROL CONTRACT.

A court of equity will not enforce a parol contract for the sale

*Rendered judgment below.

32 566
39 172

32 566
45 94
45 95
45 98
45 99
45 105

32 566
46 4

32 566
48 109
48 111
48 118
148 629

32 566
55 43

32 566
56 140

32 566
64 5

or exchange of land; unless the terms of the contract are admitted or clearly proven.

3. SPECIFIC PERFORMANCE—PAROL CONTRACT.

Such parol contract will not be specifically enforced, unless it be proven, that the parties have good titles to their respective lands; and, if the validity of the plaintiff's title is dependent on the question, whether he has had ten years' adversary possession of the land, he must, before he can enforce such contract, specifically establish by clear evidence, that he has had such adversary possession for ten years; and if he has declined to defend an action of ejectment brought by a stranger to test his title, this will be regarded as showing, that his title is so doubtful, that the court ought not to require it to be received as a good title by the other party and, the plaintiff being unable to make the other party a good title, the contract ought to be rescinded.

4. APPEAL—EVIDENCE.

Orders made pending a cause suppressing portions of the evidence offered, allowing the re-taking of depositions, and other orders regulating the preparation of the cause for a hearing in the court below, in order to be good grounds for an appeal must appear not only to be erroneous, but the appellant must show by his record that he was prejudiced by the entries of such orders.

Statement of the case by GREEN, JUDGE.

On September 8, 1824, Daniel Stringer obtained a patent from the commonwealth of Virginia for 2,000 acres of land at the forks of the Little Kanawha river in what was then Lewis county. On September 25, 1828, he conveyed this and other land to Gideon D. Camden and James W. Porter, trustees, to secure the payment of several debts due to one Daniel Mason of Culpeper county, Va. By this deed of trust upon default in the prompt payment of any said debts either of said trustees was authorized to sell said land or so much thereof, as might be necessary, for cash before the front door of Thomas Bland's tavern in Weston in said county of Lewis and to pay the proceeds on said debts secured by said deed of trust. In accordance with the terms Gideon D. Camden, one of said trustees, did on December 1, 1834, at the request of Daniel Mason sell at public auction for cash after having advertised the time and place of sale, as required by said deed of trust, said tract of 2,000 acres to said Mason for \$300.00; and by his direction said trustee on November 9, 1869, conveyed said tract of land to Samuel Merchant of the

city of Baltimore by a deed duly recorded in the clerk's office of the county of Lewis on December 9, 1839. Merchant appointed said Camden his agent and his attorney in fact to control, lease or otherwise dispose of said land; and on April 13, 1843, said Camden as such attorney in fact did in the name of his principal lease said tract to Andrew Boggs, Sr., for three years from and after April 1, 1843, the said Boggs by said lease, which he also executed, agreeing to pay to said Merchant the annual rent of 100 bushels of Indian corn to be delivered on the land and also to pay the taxes on said land, and at the end of said term, April 1, 1846, to deliver peaceable possession of said land to the said Merchant or his agent. Said Boggs under this lease took possession of and occupied the said land at once.

It further appears, that one David Alkire in 1834 took possession of a portion of this 2,000 acre tract and on July 2d 1854, entered 786 acres, a part thereof, by metes and bounds as vacant land. He surveyed this tract of 786 acres October 11, 1885, and on July 1, 1856, obtained a patent for it. This patent, it is claimed by George Bodkin and other appellants, never conferred any title to this 786 acres on David Alkire, because it appears, that, when said entry, survey and patent were made in favor of David Alkire, he was then in possession of said land as tenant under said Merchant, the owner of the Stringer patent. He had taken possession of some land, within what was afterwards made the metes and bounds of this 786 acres, about the year 1834. This land was about the year 1837 taken possession of by Andrew Boggs, Sr., under a purchase from McComas and Keneen; but he soon found, that the McComas and Keneen tract did not include this land, and thereupon he abandoned his possession under them and leased, as before stated, this 2,000 acres under the Stringer patent of Samuel Merchant, its then owner, for three years from April 1, 1843. After the expiration of this lease David Alkire took possession of this land. He occupied it for several years, but whether as a mere squatter or under any claim of title, does not appear. Afterwards one John Cunningham lived on this land a short time, but the record fails to show, whether he had any claim of title to it or not. He abandoned the possession of the land; and William B.

Alkire and John V. Alkire each afterward lived on it for short periods of time, whether under any claim of title or what claim of title, if any, does not appear; but from 1859 to 1865 Andrew Boggs, Jr., who took possession of the land under a lease from Merchant, occupied it.

On July 22, 1854, David Alkire entered this 786 acres as vacant land. He had it surveyed on October 11, 1855, and on July 1, 1856, he obtained a patent therefor from the commonwealth of Virginia. On December 5, 1859, he conveyed it to Andrew Boggs, Jr., but not being satisfied with such a title Andrew Boggs, Jr., did not have this deed recorded and in the fall of 1860 leased the 2,000 acre tract under the Stringer patent, which covered this 786 acres of land, for two years.

On September 6, 1865, Andrew Boggs, Jr., conveyed this 786 acre tract of land to George Bodkin and Nimrod G. Mundy in exchange for a tract of 725 acres, which they by a written contract had agreed to convey to him, and George Bodkin was put in possession of said 786 acres of land. Shortly thereafter a demand was made of the defendant George Bodkin by G. D. Camden, as agent and attorney in fact of said Samuel Merchant, to quit the possession of said land or become the tenant of said Merchant, or else a suit would be instituted to obtain the possession of the land. Bodkin refused to surrender possession, and thereupon said Merchant, who was a non-resident of this state, instituted in the United States District Court at Clarksburg an action of ejectment to recover the land. On March 26, 1869, a notice of the filing of this declaration was served on George Bodkin, the defendant in possession of said land. Said Bodkin and his co-defendant, Nimrod G. Mundy, about one year afterwards in the spring of 1878 met said Andrew Boggs, Jr., on the land in controversy; and said Andrew Boggs deliberately waived and relinquished all his previous claims of right and title to the land in favor of Samuel Merchant and admitted, that his title to said tract of land was good. He refused to make any contest in the ejectment suit and advised the defendant in the suit to make the best compromise he could with said Merchant; and at the same time Andrew Boggs, Jr., then and there agreed, that the contract,

by which he had agreed to exchange this 786 acres of land for the 725 acres owned by said Bodkin and Mundy, should be mutually abandoned, the said Andrew Boggs, Jr., to be refunded the costs, which he had incurred in moving on to this 725 acre tract, or which he might incur in moving from off it. He did move from off the tract, and said Bodkin gave him a horse valued at \$105.00 as the estimated cost he had incurred in such removal; and the defence of this ejectment suit was abandoned, and the controversy settled by the purchase of this land of said Merchant, who on October 20, 1870, conveyed it to said Mundy.

In the deed from Andrew Boggs, Jr., to said Bodkin and Mundy for the 786 acres of land Andrew Boggs reserved a lien upon the land conveyed to indemnify him against any liens, liabilities or defects of title, that might exist against the tract, which was to be conveyed by said Bodkin and Mundy to said Boggs in exchange for the 786 acre tract. In the spring of 1876 William H. Boggs by a parol contract purchased from Andrew Boggs, Jr., who was his father, this vendor's lien giving him therefor an undivided moiety of 145 acres, of which he put his father in possession at the time of said contract.

In February, 1881, William H. Boggs brought his suit in chancery in the Circuit Court of Braxton county against said George Bodkin and N. G. Mundy, the administrator of Andrew Boggs, Jr., and his widow and heirs to compel said Bodkin and Mundy to elect promptly to have said contract of exchange of lands between them and his father rescinded or specifically performed on their part. In his bill and three amended bills he set out substantially the facts above stated. The original bill omits any statement of the compromise or attempted compromise made in the spring of 1870, whereby it was agreed to rescind the contract for the exchange of land by Andrew Boggs, Jr., and Bodkin and Mundy.

The bill gives the contents of this contract and refers to a copy of it as filed therewith as an exhibit, though in fact no such copy was filed.

The bill alleges, that Bodkin and Mundy in this exchange of lands were to pay Andrew Boggs, Jr., \$—— boot, and that this sum has not been paid.

This bill further alleges, that on September 6, 1865, the said Andrew Boggs, Jr., made a deed to the defendants, said Bodkin and Mundy, for this tract of 786 acres of land, worth \$6,288.00 and put George Bodkin in possession thereof, who has held it ever since under said deed, and that the said Bodkin and Mundy have disposed of a large amount of timber cut from the said land and have taken the rents and profits thereof. The bill further states, that Bodkin and Mundy have not conveyed to the said Boggs, Jr., the 725 acres of land in Upshur and Webster counties according to their contract. It further alleges, that said Andrew Boggs, Jr., in said deed to Bodkin and Mundy retained a lien on the 786 acres of land to indemnify him against any liens, liabilities or defects of title on the said 725 acre tract, which by the terms of said contract was to be conveyed by Bodkin and Mundy to the said Andrew Boggs, Jr. The bill also alleges, that on September 28, 1878, for a valuable consideration said Andrew Boggs, Jr., father of the plaintiff, transferred to him all his right, title and interest in this said 725 acre tract and in the said purchase-money amounting to \$——, still unpaid, also the said lien, which he retained in the deed of the 786 acres. The bill states, that Andrew Boggs has since died intestate, and that one P. F. Duffy has qualified as his administrator. The prayer of the bill is as follows:

“Therefore plaintiff prays that the parties mentioned in the caption may be made parties defendants, and full, true, and perfect answer make to all and singular the matter herein stated and charged, and that the defendants, George Bodkin and N. G. Mundy, may be compelled to elect, within a short day given for the purpose, either to have said contract rescinded, and the deed for the 786 acres decreed void, or specifically performed on their part by the payment of \$——, the unpaid purchase-money, and the conveyance to the plaintiff of the 725 acres of land; and such other and general relief as the court may see fit to grant.”

Bodkin and Mundy appeared and demurred to this bill but withdrew their demurrer at the August term, 1881, and took a rule against the plaintiff requiring him to produce and file the original contract between Andrew Boggs, Jr., and Bodkin and Mundy. On the 4th of October, 1881, the plain-

tiff, William H. Boggs, filed his answer in writing to this rule, in which he alleges his inability to produce this contract, because it had been left by his father, Andrew Boggs, Jr., in his lifetime with one Jonathan Bennett with instructions to bring a suit upon it and he asked the judge in vacation to award a *subpœna duces tecum* to compel the production of said paper by said Bennett. The *subpœna* was awarded by the judge, and on motion of Bodkin and Mundy the rule against the plaintiff was discharged by an order made on November 29, 1881; and a rule issued against Jonathan M. Bennett to appear and show cause, why he should not be fined for his contempt in failing to file this contract alleged to be in his possession; and in April, 1882, on motion of Bodkin and Mundy the plaintiff was required to speed his cause on pain of the dismissal of the bill; and in August, 1882, the court in vacation enlarged the rule against J. M. Bennett till the next term of court, when Bennett filed his answer in writing to this rule, but no entry of filing, it appears, was made by the court. At December term, 1882, said Bodkin and Mundy filed their joint answer to the bill, to which the plaintiff replied generally and asked leave of the court to amend his bill, alleging that the said contract between Andrew Boggs, Jr., and Bodkin and Mundy was in the possession of Jonathan Bennett, who, although called upon to produce it, had heretofore failed and refused to do so. This amended bill alleged, that Bennett had an interest in this contract, and prayed, that he might be made a party defendant in the cause and be required and compelled to produce and file this contract.

On April 28, 1883, Jonathan M. Bennett filed his separate answer to this amended bill, but this answer has been taken out of the papers of the court and can not now be found. At the December term of 1883, said Bodkin and Mundy filed their amended and supplemental joint answer, in which they set out as defence the facts hereinbefore stated. They denied the waste charged by the plaintiff. They relied upon the statute of limitations. This answer was replied to generally, and the defendants subsequently demurred to the plaintiff's amended bill.

The plaintiff filed a second amended bill, in which he

states that Homer A. Holt claimed to be the owner of the 725 acres of land, which said Botkin and Mundy contracted, as before stated, to convey to Andrew Boggs, Jr., in exchange for this 786 acres of land, and filed as exhibits deeds, which purport to convey to Holt this land, but it is alleged, that Holt agreed to let said Botkin and Mundy have this 725 acres of land, and they moved upon it and took actual possession thereof and made valuable improvements thereon and were so in possession thereof, when they made the contract on September 6, 1865, to exchange it with Andrew Boggs, Jr., for the 786 acre tract aforesaid. In this second amended bill it is alleged, that this contract of exchange has been lost and can not be found after diligent search. The bill states, that Homer A. Holt on July 24, 1882, sold and conveyed this 786 acre tract to B. C. Conrad. The bill further states, that said Bodkin and Mundy sold most of the timber from off the 786 acres to Burns & Bro. and with the proceeds purchased the said land of the agent of said Merchant, who had only a pretence of title; and that Mundy has since sold this land to the son of said Bodkin, who is his brother-in-law. This deed, it is claimed, is fraudulent, as it was made for the purpose of defrauding the plaintiff; and the grantee, John P. Bodkin, it is alleged, knew all the facts. He lived with his father, George Bodkin, on this land. This amended bill asks to set aside the deed from Andrew Boggs, Jr., to said Bodkin and Mundy and also the deed from Mundy to John P. Bodkin, and restore to the plaintiff the possession of this 786 acres, and for general relief.

This second amended bill was demurred to by John Bodkin and Mundy and also answered by them jointly, and in their answer they adopt the separate answer of George Bodkin previously filed. This answer states at some length the facts hereinbefore stated and especially the rescission of the contract of exchange, which it is insisted was consummated in 1870, as hereinbefore stated. He does not even assert, that the defendants, George Bodkin and N. G. Mundy, had a valid title to the 725 acre tract in Braxton county, which was to have been conveyed to the said Andrew Boggs, Jr. All that he says on the subject is: "As to what title they had to the tract of 725 acres, which Homer A. Holt agreed to

convey to them, is a matter of no consequence in this suit, because this agreement by the plaintiff rescinded the contract sued upon in this cause."

A third amended bill similar to this second amended bill but more argumentative and more detailed in its statements was filed. The defendants, said George Bodkin and Mundy, demurred to this third amended bill and also answered it substantially as they had answered the second amended bill. These answers were replied to generally.

It was proven, that this 725 acres, known as the "Bodkin Place," was sold by Homer A. Holt to said George Bodkin and N. G. Mundy about 1855, that he gave them a title-bond therefor and put them in actual possession and took their bonds for the purchase-money; that in 1870, shortly after Andrew Boggs, Jr., and said Bodkin and Mundy had agreed to cancel their contract, whereby these 725 acres were to be exchanged for 786 acres at the forks of the Kanawha, said Bodkin and Mundy agreed with Holt to cancel the contract whereby they were to purchase from him this 725 acres, and it was accordingly cancelled, the title-bond being surrendered to Holt by them, and their purchase-money-bond surrendered by Holt to them; that they gave up the possession of the land to Holt, and he agreed to pay them from \$30.00 to \$150.00 for improvements, which they had put upon the land, and executed his bond to them therefor; that Holt afterwards sold the land to B. C. Conrad; which contract has also been rescinded by mutual consent.

There were numerous orders made suppressing depositions or portions of depositions, giving leave to re-take depositions, and other orders relating to details in the conducting of the cause in the Circuit Court. These, so far as it is deemed necessary, will be noticed in the opinion. It is not deemed necessary to notice them further now.

On May 3, 1887, the following decree was entered. "Upon consideration whereof it is adjudged, ordered and decreed that the demurrers aforesaid be severally overruled; and the court being of opinion that the plaintiff is entitled to a rescission of the contract of exchange of lands made by Andrew Boggs with George Bodkin and N. G. Mundy, whereby the said Andrew Boggs exchanged 786 acres of land in the

bill mentioned for 725 acres of land in the bill mentioned, and to a cancellation of the deed made by the said Andrew Boggs to the defendants George Bodkin and Nimrod G. Mundy, dated the 6th day of September, 1865, a copy of which is filed as 'Exhibit B' with the plaintiff's bill, it is therefore adjudged, ordered and decreed that the contract of exchange and deed aforesaid be, and are hereby, rescinded, cancelled, and annulled, and that the defendants George Bodkin and John P. Bodkin do surrender to the plaintiff the possession of the 786 acres of land, described in the said deed, and a writ of possession is awarded the plaintiff to cause him to have the possession thereof. It is further adjudged, ordered, and decreed that N. G. Mundy, George Bodkin, and John P. Bodkin do pay to the plaintiff his costs by him herein expended; but it is provided that this decree shall not prejudice the right of the said defendants Bodkin to assert or maintain their right and title, if any they have, to the 786 acres of land aforesaid, derived by them, or either of them, from or under Samuel Merchant, in any suit or proceeding in which it may be involved. At the instance of the defendants George Bodkin and John P. Bodkin it is ordered, that the execution of this decree be suspended for the period of eighty days upon the said defendants or either of them giving bond before the clerk of this court with good security to be approved by him in the penalty of \$400.00 conditioned for the payment of all such damages as any person may sustain by reason of such suspension in case a *supersedeas* to this decree shall not be allowed, and be effectual, within the time aforesaid."

To which decree an appeal and *supersedeas* were awarded to George Bodkin and N. G. Mundy, on July 11, 1887.

J. J. Davis and Dayton & Dayton for appellants.

C. P. Dorr and G. J. Arnold for appellee.

GREEN, JUDGE:

The prayer of the original bill in this cause was "that the defendants George Bodkin and N. G. Mundy may be compelled to elect within a short day given for the purpose

either to have said contract rescinded, and the deed for the 786 acres decreed void, or specifically performed on their part by the payment of \$——, the unpaid purchase-money, and the conveyance to the plaintiff of the 725 acres of land; and for general relief." The evidence shows, that eleven years before this in 1876 the plaintiff finding, that he could not make good his warranty of title for the 786 acres of land contained in his deed to said Bodkin and Mundy, and that they having been sued by one Merchant for the tract of land, which they had been put in possession of, would lose the same, proposed to rescind this contract of exchange for the 786 acre tract for said tract of 725 acres, and that the proposition was accepted by the defendants the said Bodkin and Mundy, and completely consummated by them, they on the plaintiff's advice abandoning all defence of the ejectment-suit brought to recover this 786 acres of land of them, and Andrew Boggs, Jr., the father of the plaintiff, abandoning his possession of the 725 acre tract. So that in point of fact the parties to this contract had so far back as 1870 mutually agreed, that what was asked by the plaintiff's original bill was right and proper. This being the case, it is difficult to see how the court could do otherwise than rescind the contract for the exchange of these two tracts of land.

It was agreed in 1870, that this should be done, because the father of the plaintiff, Andrew Boggs, Jr., did not, as he then admitted, have a good title to the 786 acre tract. But, if proper then, it was much more proper and necessary in 1881, when this suit was instituted, as it was proven in the case, that the defendants, Bodkin and Mundy, did not then have a pretence of title to the 725 acre tract. They never did have any title; but they did have, when this contract of exchange was made, a right to demand a conveyance of this land upon their paying the purchase-money to Holt, of whom they bought it. But this right to demand a conveyance of this land was lost by them in 1870, they having rescinded their contract for the purchase of this land, given up the possession of it to Holt, and annulled the contract of sale, and Holt, the vendor, having surrendered to them their purchase-money-bonds and paid them for their improvements on the land. It would therefore obviously have been im-

proper for the Circuit Court in this cause to specifically enforce this contract, as neither party had title to the tract of land, which they undertook to exchange. It was of course proper, if the contract was to be rescinded, to restore each party to the situation he was in, when the contract was entered into. The defendants, said Bodkin and Mundy, were thus restored to the situation, in which they were, when the parties had themselves agreed on a rescission of the contract in 1870; that is to say, Andrew Boggs had surrendered to them the possession of the 725 acre tract, which they had put in his possession. To restore the other side to the position, in which they were, before this contract was made, it was necessary not only to require Bodkin and Mundy to surrender to the plaintiff, as the representative of Andrew Boggs, Jr., the 786 acre tract, the possession of which was obtained from said Boggs, but it was also necessary to set aside and annul the deed from said Andrew Boggs to them, dated September 6, 1865; and this was properly done by the decree appealed from, rendered May 3, 1887.

The counsel for the appellants insist, that this agreement made 1870 by said Andrew Boggs, Jr., and said Bodkin and Mundy to cancel this contract for the exchange of lands being but an executory parol agreement was a mere nullity, as the agreement to exchange these lands being in writing could only be set aside by an agreement in writing signed by the grantees. But the agreement in 1870 was not simply an executory agreement in writing signed by the grantees, it was executed by said Andrew Boggs, Jr., by his surrender to Bodkin and Mundy of the possession of their 725 acres of land, and they disposed of it by restoring it to Holt, from whom they had agreed to purchase it, taking back their purchase-money-bonds and cancelling and surrendering the contract, whereby they became the purchasers of this land from Holt. After this, said Bodkin and Mundy could not equitably refuse to surrender to said Andrew Boggs, Jr., his 786 acres got from him in exchange for this 725 acres, and to cancel the contract for the exchange of these lands, even were the position of the appellants' counsel—that a mere executory parol contract would be insufficient to cancel a written contract for the exchange of land—tenable.

But the Court would have to set aside this contract of exchange, even though the partnership had not made a valid agreement to do so in 1870; for the parties to this contract for the exchange of lands and their representatives are unable to specifically execute the same. Said Andrew Boggs, Jr., and representatives have not and never did have such good title to the 786 acres of land, that a court of equity would be justified in holding, that their deed to said Bodkin and Mundy conveyed to them such title to his 786 acres of land, as would compel them to receive in compliance with his obligation to give this tract of land and a clear and valid title thereto. The appellants admit, that on the face of the deeds the title of said Andrew Boggs, Jr., was not good. He traced his title back to a patent July 1, 1856, by the State. But it appears in proof, that one Daniel Stringer had a patent issued to him by the State on September 8, 1824, for a 2,000 acre tract, which covered the whole of this 786 acres as entered, surveyed and patented to David Alkire more than thirty years afterwards.

It is claimed however, that David Alkire and those claiming under him acquired a valid title to this 786 acres of land by the fact, that they held in adversary possession against Daniel Stringer and those claiming under him for more than ten years prior to September 6, 1865, when this tract of land was conveyed by said Andrew Boggs and wife to said George Bodkin and Nimrod G. Mundy in accordance with said contract for the exchange of this land for the 725 acre tract. To constitute adversary possession, such as will bar the legal owner, five elements must exist. It must be (1) hostile; (2) actual; (3) visible, notorious and exclusive; (4) continuous; (5) under claim of title. See *Core v. Faupel*, 24 W. Va. 238, point 1 of syllabus.

The appellants' counsel insist, that neither David Alkire nor any one claiming under him ever held adverse or hostile possession of the 786 acres of land as against Daniel Stringer or those claiming under him. Stringer obtained a patent for 2,000 acres of land covering that located and surveyed by David Alkire some thirty years afterwards. It is true, that as early as 1834 David Alkire settled on this land and actually built a house thereon and cleared up and inclosed a

few acres of ground. The simple proving, that a party was in actual possession of a tract of land, is not sufficient; for the burden of proving, that the possession was adverse and hostile and not under the legal owner of the land, is on the person, who asserts, that such possession was adverse. See *Jones v. Porter*, 2 Pen. & W. 132. There is proof, that David Alkire took possession, as before stated, by enclosing a few acres of land in 1834. There was then, so far as the record shows, no claimant of this 786 acres of land or any part of it except Daniel Stringer, who had had a patent for a tract of land covering it for some ten years.

The appellants insist, that the presumption of fact is, that David Alkire entered on this land under the title of Daniel Stringer, and that this presumption is much strengthened by the fact, that the record shows no other claim of title to this land till July 22, 1854, when he entered this 786 acres of land as vacant land. In the meantime he had abandoned or surrendered the possession of this land for many years; for in 1843 Samuel Merchant, who claimed the land under the patent of Daniel Stringer, leased this land to Andrew Boggs, Sr., for three years from April 1, 1843, and put said lessee in the possession of said land, it being then unoccupied by any one. Before this lease expired Andrew Boggs, Jr., the plaintiff's father, the son of the lessee Andrew Boggs, Sr., married, and thereupon he moved into said house on this 786 acre tract, and he occupied it for some three years under his father, who was holding it under the Stringer title as tenant, when he gave it up. The agent of Samuel Merchant leased the lower part of this survey to Thomas Roby, who with his son as tenant under those claiming under the Stringer survey occupied a portion of this 2,000 acre tract by living upon it and cultivating a portion of it from 1854 till 1863.

It is insisted by the counsel for the appellee, that the possession of David Alkire and those claiming under him was not exclusive during these nine years, and also that it was not continuous, as the law requires. David Alkire obtained his patent for this 786 acres of land in July 1, 1856. He had it entered on July 22, 1854, and made a deed of it to said Andrew Boggs, Jr., on December 5, 1854, which was

not recorded till December 10, 1866. Yet in 1860 said Andrew Boggs took a lease of the whole 2,000 acre tract including this 786 acres, which had been patented to David Alkire from Samuel Merchant, claiming under the Stringer title; and if he had any adverse possession under the Alkire title, which commenced in 1854, this hostile possession was broken up by his claim as lessee under the Stringer title in 1860 and afterwards.

There is certainly much force in these views of counsel of George Bodkin and N. G. Mundy. They at least show, that the title of Andrew Boggs, Jr., to this 786 acres of land was very far from being clearly good; and when it is remembered, that in 1870 Andrew Boggs, Jr., had an opportunity of establishing his title to this land, if he had good title, in the action of ejectment brought against his vendees, said Bodkin and Mundy, by said Merchant claiming under this Stringer title, and that he did not avail himself of this opportunity but then admitted the superiority of the Stringer title and advised his said vendees not to defend said suit but either to surrender the land to the claimant under this Stringer title or compromise the suit on the best terms they could make, it would not be right for a court of equity to compel the defendants, George Bodkin and N. G. Mundy, to accept as a fulfilment of their part of the contract to convey this 786 acres with a good title to them this deed from him to them. This title, if not actually worthless, was at least so regarded by himself, and they ought not to be compelled to run the risk of losing this 786 acre tract, when it appears, that said Andrew Boggs, who ought to know the character of his title, obviously regarded this risk as so great, that he thought, the loss of it by them almost a certainty.

But there is still another reason, not noticed in the argument of this cause, which would of itself require the abandonment of this contract for exchange of lands of September 6, 1865; *i. e.*, the entire failure of the record to show, what were the terms of the contract. The bill alleges, that the defendants George Bodkin and N. G. Mundy were by said agreement in exchange for said 786 acres not only to convey the said 725 acres but also to pay the said Andrew Boggs \$———. They neither conveyed said 725 acres of land to him

nor paid him said money. That these were the terms of this contract, is denied by the answers of these defendants, which were replied to generally; and there is an entire failure of proof as to the terms of this contract or exchange. There is proof, that an exchange of these two tracts was agreed upon, but no one proves, whether there was to be any boot paid in the exchange by either party. The contract was reduced to writing, and this writing was in the possession of Jonathan M. Bennett, when this suit was instituted. He refused however to produce this written contract, though required so to do by the court; and in one of the later amended bills it is alleged by the plaintiff to have been lost. It never was produced, nor has its contents ever been proven. This of course would effectually prevent the Court from specifically enforcing this contract.

There were certain orders made during the progress of this cause, which have not been noticed. The first of these made August 29, 1884, granted the defendant George Bodkin for reasons set forth in the affidavit of his counsel leave to re-take the depositions of G. D. Camden upon giving notice to the plaintiff of the time and place of such examination. It will suffice to say in reference to this, that it is unnecessary to consider the merits of this order, as it was made at the instance of the appellants in the cause, and they can not therefore complain.

The reading of the deposition was excepted to by the plaintiff, and two exceptions indorsed on the back thereof. One of those exceptions was that "the notary continued the taking of depositions without commencing the examination of a witness and without notice or presence of the plaintiff first from December 11, 1883, until December 20, 1883, and from December 20, 1883, until December 25, 1883, and the plaintiff would have been subjected to unlawful expense and trouble to have attended on all of said days." This exception was overruled by an order made September 8, 1885; and portions of these depositions were read by the court at the final hearing of the cause. It appears, that, when these several continuances were made, a formal order was made by the notary stating, that no witness had appeared, and the "taking of these depositions is continued to the specific day,

at the same place, and between the same hours." This memorandum was dated and signed by the notary public, officially. The taking of these depositions was perfectly regular, and this exception to them was properly overruled by the court.

The plaintiff, by the manner in which these depositions were taken, was not compelled to attend at the place named for taking them five different times, as the exception seems to assume. In point of fact, he did not attend a single time; and, if he had attended when first notified, he could have asked, that the witness who did not attend, be summoned to attend by subpoena issued by the notary at the time fixed at the first continuance; and the presumption is, that the witness would have done so, and his deposition would have been taken at the second continuance instead of the fifth. The plaintiff had no right to object to this deposition being taken on the 28th. He utterly neglected to pay any attention to the notice he received to take this deposition, and he can properly attribute his absence, when the deposition was taken, to his own neglect, and not to the action of the notary in regularly continuing the taking of depositions from time to time.

The plaintiff also excepted to so much of the deposition of N. G. Mundy taken then as detailed any conversation or declaration made by Andrew Boggs, Jr., deceased, to him; and a like exception was taken to the deposition of John P. Bodkin, taken on November 28, 1885, and December 3, 1885. The court sustained these exceptions and ordered, that so much of these depositions as gives any personal transactions or communications between the witnesses as respective parties to this suit and Andrew Boggs, Jr., be suppressed. This suppression of this portion of these depositions was obviously right.

These orders should have designated the answers to specified questions which were thus suppressed; but the plaintiff can not complain in this Court that the answers were not so designated as the record does not show, that he asked the court below to be thus specific in making these orders; and it does not appear from the whole record, that he was injured by the manner, in which these orders were made, for it does

not appear, that the court below at the hearing of this cause read or considered any of the answers of these witnesses, which ought to have been suppressed as incompetent evidence; and, omitting all such evidence, there was ample testimony in the cause to justify the court below in reaching the conclusion which it did.

One of the errors assigned in the petition for the appeal of George Bodkin and N. G. Mundy and John P. Bodkin is, that the court erred in sustaining the exception of the plaintiff to the deposition of G. D. Camden, taken on the 19th of October, 1883, and filed in the cause. There is nothing, of which they can complain alleged in this ground of error; for on motion of the said defendants, Bodkin and Mundy, on August 25, 1884, they were given leave to re-take the deposition of Gideon D. Camden, and on August 23, 1886, they did re-take his deposition, and it was again taken on August 12, 1887. These depositions were read by the court, and the appellants could have sustained no injury from the first deposition of G. D. Camden not having been read by the court, as the depositions, which were read, contain all and more than what was contained in his first deposition. The appellant must show, not only that such orders made pending the cause was erroneous, but that he sustained injury thereby.

The depositions of Washington Boggs and V. M. Roby taken before Lewis Kelly, as notary public, on November 21, 1884, were improperly suppressed by an order made December 3, 1885, on exception of plaintiff to the reading of them. These depositions should have been read by the court; and in stating and deciding this case I have considered them as in the cause. They rather strengthen the position of the appellees and, it seems to me, were not very prejudicial to the plaintiff but really strengthened his case though the depositions were taken by the defendants.

The court by its order on December 2, 1886, sustained the exception of the plaintiff to the reading of an attested copy to the deed of trust from Daniel Stringer to Camden and Porter, trustees, filed with the defendants' answer, in tracing the title of Merchant to Daniel Stringer's patent, and in order to show that Andrew Boggs, Jr., did not have a good title to

the 786 acre tract claimed under a patent subsequent in date to Stringer's. This deed of trust is signed "D. STRINGER," and was recorded on its acknowledgment by D. Stringer before the clerk of the County Court of Lewis, who was D. Stringer. This acknowledgment was, as held by the court below, fatally defective, if the Daniel Stringer, who executed the deed, was the same person as D. Stringer, the clerk, as a person can not acknowledge a deed before himself. There is no proof on the question, that arises, whether they were the same person, though it is very obvious it could have been proved by G. D. Camden, whether they were or not. It seems to me, that in the absence of all proof on this point the presumption on the face of the deed is, that they were the same person; for it appears, that the grantor was a resident of Lewis county, and that he signed his name "D. STRINGER," just as the clerk signs his name. If so, the court did not err in excluding this copy of this deed as evidence. This however does not materially alter the case as presented to the court. In my statement and consideration of the case I have regarded Merchant's title as properly traced back and connected with D. Stringer's patent; that is, I have regarded the existence of this deed of trust as established. It is really immaterial, whether the valid title to this tract of land was in Merchant or D. Stringer, except as it might affect the question of adversary title claimed by David Alkire under his patent in 1856, and it could have no effect on this question, whether he had this deed of trust or not, as it is still abundantly proven, that Merchant claimed title under the Stringer patent; and, whether he actually had a good title, would of course depend on whether this copy of this deed of trust was or was not evidence. But that question is not involved in this cause, but simply whether he claimed title under the Stringer patent, and this is abundantly proven.

I am unable to find any errors in this record prejudicial to the appellants. The decree of the Circuit Court of May 3, 1881, must therefore be affirmed, and the appellee must recover of the appellants his costs in this Court expended, and \$30.00 damages.

AFFIRMED.

WHEELING.

ROOTS v. KILBRETH.

(ENGLISH, JUDGE, absent.)

Submitted June 26, 1889.—Decided June 28, 1889.

1. APPELLATE COURT—COMMISSIONER OF COURT—CIRCUIT COURT.

Where questions of fact are referred to and passed upon by a commissioner, and the findings of the commissioner are overruled and disaffirmed by the Circuit Court, the appellate court must determine for itself from the facts and circumstances disclosed by the record, whether it will sustain the conclusion of the commissioner or that of the Circuit Court.

2. APPELLATE COURT—COMMISSIONER OF COURT—CIRCUIT COURT.

A case, in which the appellate court upon the facts and evidence sustained the action of the Circuit Court in overruling the findings of the commissioner and in sustaining exceptions taken to the commissioner's report.

Gunn & Gibbons for appellants.

Knight & Couch and *Simpson & Howard* for appellees.

SNYDER, PRESIDENT :

At the March rules, 1884, the individuals composing the firm of Roots & Co. commenced this suit in the Circuit Court of Mason county against the Mason City Salt & Mining Company and G. Y. Roots and James P. Kilbreth composing the firm of Roots & Kilbreth and others to enforce the sale of certain real estate in said county, conveyed by said salt and mining company to a trustee to secure the payment of 140 coupon bonds of \$500.00 each, and to distribute the proceeds among the owners of said bonds.

The bill alleged that eighty of said bonds, amounting to \$40,000.00, were held by Roots & Co. as collateral security for the indebtedness of Roots & Kilbreth to said Roots & Co., which indebtedness the plaintiffs alleged was \$23,568.93, and that the other sixty of said bonds were held as follows: G. Y. Roots, thirty, James P. Kilbreth, twenty, and M. M. White, ten, of said bonds.

32	585
40	144
40	152
32	585
45	727
32	585
53	206
32	585
66	147

James P. Kilbreth answered the bill denying, that the firm of Roots & Kilbreth was indebted to Roots & Co. in the sum alleged or in any sum, and by way of affirmative relief prayed, that an account be ordered to state and settle the accounts between the firms of Roots & Co. and Roots & Kilbreth. Kilbreth also pleaded usury and the statute of limitations in respect to the alleged indebtedness of Roots & Kilbreth to Roots & Co.

The trust-subject was sold, and the sale confirmed without objection, at the price of \$12,500.00, of which sum it was ascertained, that about \$6,800.00 would be applicable to the eighty bonds of Roots & Kilbreth held by Roots & Co. as collateral security. The cause was referred to a commissioner to ascertain the holders of said coupon-bonds and to settle the accounts between the firms of Roots & Kilbreth and Roots & Co. and to report, in whose favor the balance exists. On the coming in of said report the court without adjudicating the true state of accounts between Roots & Kilbreth and Roots & Co. decided, that the evidence in the cause showed, that the indebtedness of the former to the latter firm was of such an amount as to entitle Roots & Co. to the said \$6,800.00—the proceeds of the sale applicable to the payment of said eighty bonds held by Roots & Co. as collateral for said indebtedness—and entered a decree directing the payment of said proceeds to Root & Co. without prejudice to the right of either of said firms to bring a new suit to settle and ascertain the true state of accounts between them.

From this decree the defendant Kilbreth brought the cause by appeal to this Court. On the hearing here this Court, being of opinion that the Circuit Court before directing said \$6,800.00 to be paid to Roots & Co., should have investigated the accounts between Roots & Kilbreth and Roots & Co. and finally determined, whether there was any indebtedness by either of said firms to the other, reversed so much of the said decree of the Circuit Court, as decided, that Roots & Kilbreth are indebted to Roots & Co. in a sum equal to the proceeds of the sale applicable to the payment of the collaterals held by Roots & Co., and ordered said sum to be paid to Roots & Co. and remanded the cause to the Circuit Court for further proceedings there to be had in accordance with

the principles announced in the opinion filed by this Court. *Roots v. Salt & Mining Co.*, 27 W. Va. 483.

After the mandate of this Court had been entered in the Circuit Court, that court made an order referring the same to a commissioner to settle the accounts between the firms of Roots & Kilbreth and Roots & Co. The commissioner made a report, which was excepted to by Roots & Co., and the same was recommitted to the commissioner. The defendant Kilbreth, by leave of the court, filed a cross-bill, to which Roots & Co. filed their answer.

From August, 1872, to about October, 1875, G. Y. Roots and James P. Kilbreth were the joint owners of the coal and salt property in Mason county, which was in 1875 conveyed to the Mason City Salt & Mining Company; and they as partners under the name of Roots & Kilbreth carried on with said property the business of mining coal and manufacturing and selling salt. During the same time Roots & Co., a partnership, of which G. Y. Roots was the owner of a seven tenths interest, was conducting a commission-business in Cincinnati, Ohio, and the business of both of said firms was for the greater portion of said time under the management of said Roots, and especially was such the case in respect to the firm of Roots & Kilbreth. Roots & Co. acted as the factors or agents of Roots & Kilbreth for selling salt and furnishing supplies; and, while the latter was in active operation, Roots & Co. rendered itemized accounts to it semi-annually; and, after its dissolution, Roots & Co. rendered to it sundry accounts or statements, making in all twenty two in number. These accounts show, that no supplies were furnished by Roots & Co. after December, 1875, and the last credit for salt sold was given in 1876. In these accounts Roots & Co. charge Roots & Kilbreth interest at the rate of ten *per cent.* upon advances made according to an agreement made by G. Y. Roots acting for the firm of Roots & Kilbreth, of which Kilbreth was fully informed, and to which he made no objection at the time.

Kilbreth in his cross-bill charges, that said accounts rendered by Roots & Co. to Roots & Kilbreth are usurious; that they contain overcharges of commissions on salt sold by or through them; that clerical errors appear upon their face; that

they fail to credit Roots & Kilbreth with the proceeds of eight coupon-bonds of \$500.00 each, which ought to be credited; and that by reason of other errors in said accounts the firm of Roots & Kilbreth instead of being indebted to Roots & Co. in the sum of \$23,568.93, or any other sum, are the creditors of Roots & Co. for a large amount of money. He then avers, that he had not until recently discovered the said errors and omissions in said account.

After the Circuit Court had decided the cause in May, 1875, and before the appeal was taken from that decree, the commissioners, who made the sale of the trust-property, paid over to Roots & Co. \$6,774.77, being the portion of the proceeds of the sale applicable to the eighty bonds held by Roots & Co. as collaterals. The commissioner after considering the depositions and documentary evidence filed in the cause re-formed and re-stated the accounts between Roots & Kilbreth and Roots & Co., and reported in lieu of the alleged balance of \$23,568.93 in favor of Roots & Co., that said firm was indebted to Roots & Kilbreth, as of February 6, 1888, in the sum of \$7,577.10, and that in addition thereto Roots & Kilbreth were entitled to the \$6,774.77, proceeds of the sale paid over to Roots & Co. as aforesaid, with the interest thereon, making the aggregate indebtedness of Roots & Co. to Roots & Kilbreth, as of that date, \$15,572.50.

To this report Kilbreth filed two, and Roots & Co. eight, exceptions. The court sustained one of the exceptions of Kilbreth and two of those of Roots & Co., and overruled all the others. After correcting and reforming the report, so as to make it conform to these rulings, it was found that Roots & Co. was indebted to Roots & Kilbreth, as of May 18, 1888, the date of the decree, in the sum of \$2,773.04; and for this and the costs of this suit the court entered its final decree in favor of Roots & Kilbreth against Roots & Co.

From this decree the defendant Kilbreth has obtained this appeal.

As the real controversy on this appeal is confined to the action of the court in sustaining the third and fourth exceptions of Roots & Co. to the report of the commissioner, and in modifying said report and decreeing accordingly, it is unnecessary to consider any part of the record not bearing upon the questions presented by these exceptions.

The first of these exceptions so sustained is taken to the action of the commissioner in opening and striking from the stated accounts rendered by Roots & Co. to Roots & Kilbreth certain alleged overcharges of commissions on salt sold by Roots & Co. for Roots & Kilbreth, and charged by Roots & Co. in said stated accounts. The evidence in the record shows, that, when Roots & Co. were engaged to act as the factors of Roots & Kilbreth in selling salt, purchasing supplies and making advances in money for said purchases, Roots as the managing partner of Roots & Kilbreth agreed to pay Roots & Co. twenty five cents commission per large barrel, and twenty cents per small barrel for salt sold directly by Roots & Co., and one half this commission on salt placed by them for sale in the hands of sub-agents, Roots & Co. guarantying all sales. Subsequently, the salt-business becoming depressed, Roots prevailed on Roots & Co. to reduce these commissions to twenty and fifteen cents per barrel, the sales still being guarantied, and finally the commission was reduced to five cents per barrel without guaranty. The commissioner found, that the quantity of salt sold by sub-agents of Roots & Co. was 61,759 barrels, on which the one half commissions amounted to \$6,084.77; and this being in the opinion of the commissioner an unreasonable charge, he reduced it to \$1,852.77, or three cents per barrel, making a difference of \$4,232.00 against Roots & Co. No deduction is made in the report on the commissions charged by Roots & Co. for salt sold by them direct; and the reason given for disallowing the commissions to Roots & Co. for the salt sold by their sub-agents is, that these commissions are in addition to the commissions charged by the sub-agents, thus subjecting the salt so sold to double commissions, a charge, which in the opinion of the commissioner ought not to be allowed in the absence of a contract authorizing it. I have been unable to find from the evidence in the record, that double commissions have been charged on any of the salt. The charge by Roots & Co. on salt sold by their agents is just one half of that charged on the salt sold directly by themselves; and the evidence shows, that Roots & Co. divided the commissions with the sub-agents on the salt sold by the latter, thereby making the entire commissions on the sales

made by the sub-agents no greater than that sold directly by Roots & Co. under their contract with Roots & Kilbreth.

The commissioner, however holds, that the alleged contract between Roots & Kilbreth and Roots & Co. in respect to these commissions is invalid, because made by G. Y. Roots, who had a greater interest in the firm of Roots & Co. than he had in the firm of Roots & Kilbreth. The position would no doubt be correct if such contract had been made and enforced without the consent or acquiescence of Kilbreth, but the evidence shows, that Roots at the instance of Kilbreth was made the active manager of the business of the firm of Roots & Kilbreth, and that Kilbreth knew all about this contract and the commissions, which were being charged by Roots & Co., and he never made any protest or objection thereto, until long after the partnership had ceased to do business. The only excuse given now by Kilbreth for not objecting to these charges is, that the accounts rendered to him by Roots and Roots & Co. were so indefinite, that he did not discover, until recently what commissions were charged.

It is clearly shown, that Kilbreth is a skillful accountant and fully competent to unravel and understand accounts, such as were from time to time furnished him by Roots & Co. These commissions were charged on these accounts in such a manner, that a simple calculation from the *data* given would disclose the amounts of the commissions. If however such had not been the case, the accounts certainly showed, that Roots & Co. were charging commissions on salt sold by sub-agents, and Kilbreth had the means before him to inform himself either by inquiry or calculation, and determine the rate of these commissions, and whether or not they exceeded the rates he had assented to. He had all the *data* then, that we have before us now; and, if he could not discover then, that there were double commissions, which in the aggregate exceeded those charged on salt sold directly by Roots & Co., we are at a loss to know why it is expected we should, without any more detailed statements of the accounts, be able to discover, that double or excessive commissions had been charged. As before stated, we are wholly unable to find in the record before us, that the aggre-

gate commissions of Roots & Co. and their sub-agents on the salt sold by the latter in any case exceeded the charges made by Roots & Co. on sales made directly by them; and as the commissioner allowed those latter charges, and no exception was taken to the report by Kilbreth on that account, we think the commissioner should not have reduced the commission on the salt sold by the sub-agents, and that the Circuit Court properly sustained the said third exception of Roots & Co. to the report.

The second exception so sustained, which is the fourth exception of Roots & Co. to the commissioner's report, relates to a charge against Roots & Co. of four coupon-bonds of \$500.00 each. Of the 140 coupon-bonds issued, as before stated by the Mason City Salt & Mining Company, thirty were from time to time delivered to Kilbreth to be disposed of by him, the proceeds to be applied to the indebtedness of Roots & Kilbreth to Roots & Co., and a like number of the bonds were to be disposed of by G. Y. Roots for the same purpose. Roots & Co. contend that four of these thirty bonds delivered to Kilbreth were never paid for, and Kilbreth contends, that he did pay for these bonds at the time he got them. The commissioner decided from the evidence, that Kilbreth paid for the bonds and charged their proceeds to Roots & Co., while the Circuit Court sustained the exception of Roots & Co. to the said charge and decided, that the bonds had not been paid for and refused to charge them to Roots & Co.

The question here presented is one of fact, about which the commissioner and the Circuit Court have differed. The rule is well settled in this State, that, when questions of fact are passed upon by a commissioner, and his findings thereon are approved and confirmed by the Circuit Court, the appellate court will regard those findings in the nature of a verdict of a jury and will not reverse them, unless it plainly appears, that they are not warranted by any reasonable view of the evidence. *Handy v. Scott*, 26 W. Va. 710; *Boyd v. Gunnison*, 14 W. Va. 19. This rule however can have no application in a case such as the one before us, in which the findings of the commissioner have been overruled and disaffirmed by the Circuit Court. In such case the appellate

court must determine for itself from the facts and circumstances disclosed by the record, whether it will sustain the conclusion of the commissioner or that of the Circuit Court.

At the time these bonds were being delivered to Kilbreth by G. Y. Roots, acting for Roots & Co., who held all the bonds as collateral security, Roots kept a memorandum-book, in which he entered at the time of each delivery the numbers of the bonds delivered to Kilbreth and the amount of the proceeds thereof to be credited for same. This memorandum, which appears in the record, shows, that five bonds were delivered and paid for on February 23, 1876, five delivered and paid for March 14, 1876, and then follows this entry: "Also (4) bonds, Nos. 117, 118, 119, 120. Have not received proceeds of these 4 bonds." Following this are five entries showing that sixteen other bonds had been delivered to Kilbreth and paid for by him between October 28, 1876, and October 1, 1878. The books of Roots & Co. also show, that, while thirty bonds were delivered to Kilbreth, he is credited with the payment of only twenty six. The credit opposite the four bonds in dispute is left blank; and, during the time these bonds were being delivered to Kilbreth, Roots and Roots & Co. credited Roots & Kilbreth with the proceeds received for them, and at stated times, soon after each credit, sent accounts to Kilbreth showing the dates of credits and the amounts of the bonds credited; and on none of these accounts is there any credit for the proceeds of these four bonds, though they show credits for the proceeds of all the other twenty six bonds.

With these accounts before Kilbreth for years before this suit was brought, and until after it had been once decided in the Circuit Court and by this Court on appeal, he made no claim, that he had not been credited with all he was entitled to on account of the bonds delivered to him. It seems to me, that the memorandum shows conclusively, that he did not pay for these four bonds, at the time they were delivered to him, and the circumstances tend strongly to show, that he never afterwards paid for them. But, as he admits, that he received the bonds, the burden was on him to show, that he paid for them. G. Y. Roots testifies, that said bonds were never paid for, and his testimony is supported by Stegemeyer,

the book-keeper of Roots & Co. Kilberth testifies, that he paid for these four bonds, at the time he got them, but he is unable to state to whom he made the payment, or how he paid it,—whether by draft, check, or in currency; and, when asked on cross-examination to examine his bank-account in the banks, in which he did business about that time, he contents himself with answering, that he can not do that within a reasonable time, and makes no attempt to do so; nor did he offer to search for or make any effort to produce from any source any entry or memorandum tending to show, that he had paid for said bonds. It seems to me almost impossible, that a man living in a city, keeping a bank account and transacting business in a city and a good accountant having the precise date of the payment of \$2,000.00 could not find, either in the banks, where he did business, or among his private papers some entry or memorandum in reference to such payment, if he ever made it. The indifference of Kilbreth and his absolute failure to produce any such entry or memorandum or any explanation of such failure is very potent evidence to my mind, that no such payment was ever made by him. But, as before stated, the burden was on him to prove the payment; and in my opinion, taking all the evidence into consideration, he has not only failed to establish the payment, but the weight of the evidence as well as the surrounding facts and circumstances tend strongly to show affirmatively, that the payment was never made.

I therefore think, that the Circuit Court did not err in sustaining the said third exception of Roots & Co. to the report of the commissioner.

The appellees, Roots & Co., claim and assign as error the refusal of the court to sustain their exception to the commissioner's report, whereby they were denied interest at ten *per cent.* on the advances made by them to Roots & Kilbreth according to contract. They claim that the contract was made and was to be performed in Ohio, and that in that state parties are allowed to contract in writing for the payment of interest at a greater rate than six *per cent.*, and that such contract is not usurious.

The difficulty in sustaining this claim is, that the evidence fails to show that there was any contract in writing author-

izing Roots & Co. to charge interest at the rate of ten *per cent.* G. Y. Roots, the party, who made the contract, testifies, that it was a verbal contract. The only pretence of any writing to that effect is, that, after the accounts of Roots & Co. had been rendered to Roots & Kilbreth, in which interest on advances had been charged at ten *per cent.*, Kilbreth, one of the members of the firm of Roots & Kilbreth, wrote a letter to Roots & Co., in which he says, that they (Roots & Co.) have been getting a liberal interest, of which he makes no complaint. If this letter had been written by the firm instead of by one of its members, it would not constitute a contract for the payment of ten *per cent.* interest. It was a mere recognition of the fact, that such interest had been charged without objection, but it contained no agreement or promise to pay such interest; and even if it had, being made after the interest had accrued and not in respect to interest to accrue thereafter it is very questionable, if it could be considered as binding. Clearly, this was no such written contract, as would under the Ohio statute defeat the plea of usury filed in this cause by Kilbreth.

For the reasons aforesaid I am of opinion, that the decree of the Circuit Court should be affirmed.

AFFIRMED.

WHEELING.

SANDS v. BEARDSLEY.

(ENGLISH, JUDGE, absent.)

Submitted June 15, 1889.—Decided June 28, 1889.

1. NOTICE—RECORDATION.

A., having the equitable title to real estate, executed a trust-deed thereon to secure a debt to B., and said deed was duly recorded. Subsequently A. sold the property to C., and by direction of A. the holder of the legal title conveyed the same by deed directly to C., who, after his deed had been recorded, executed a trust-deed upon the real estate to secure a debt to D. *Held*: The

recordation of said trust-deed to secure a debt to B. did not operate as constructive notice to D., and the lien of D. will have priority over that of B., unless B. shows, that D. had actual notice of the existence of his deed at the time D. acquired his lien.

2. ISSUE OUT OF CHANCERY—REVERSAL OF DECREE.

A chancellor should not direct an issue out of chancery, until the plaintiff has thrown the burden of proof upon the defendant. Therefore, where there is a direct conflict between two witnesses, the one affirming and the other denying the fact to be proved, no issue should be directed; and if one is directed, upon which the jury render an affirmative verdict, and a decree is made accordingly, the appellate court will reverse the decree, because the issue was improperly ordered.

Harvey, Vinson & McDonald for appellant, William Biggs.

Simms & Enslow for appellees.

SNYDER, PRESIDENT :

The Central Land Company being the owner of lot 14, block 95, in the city of Huntington, Cabell county, sold and conveyed the same to J. H. Russell and M. E. Miller by deed dated in 1871, which deed was duly recorded in said county. In 1879, Russell and Miller by an executory contract, which was never recorded, sold said lot to Mary M. Wilson and D. M. Magann, who took possession and built a mill upon it designated in the record as "Biggs's Mill." By deed dated May 19, 1880, Wilson and Magann conveyed their equitable title to said property to J. N. Potts, trustee, to secure a note executed by them to Margaret Sands, which deed was duly recorded May 24, 1880. Soon thereafter Wilson and Magann by title-bond, which was never recorded, sold their interest in said lot to W. B. Wilson, who was placed in possession of it; and he by deed dated March 14, 1881, conveyed his equitable interest therein to J. H. Cammack, trustee, to secure a note executed by him to Mary M. Wilson for \$325.00, which note was assigned to and is now owned by George Sampson. This trust-deed was recorded in Cabell county on May 19, 1882. Afterwards the said Russell and Miller by direction of the aforesaid Mary M. Wilson and D. M. Magann conveyed the legal title of said lot directly to said W. B. Wilson by deed dated January 24, 1882, but which was not recorded until June 1, 1882. By deed dated Febru-

ary 9, 1883, which was duly recorded on March 15, 1883, said Wilson and wife conveyed the one moiety of said property to A. J. Beardsley; and subsequently Wilson and Beardsley executed two trust-deeds on the property to secure debts due to William Biggs, the first dated February 9, 1883, and recorded February 26, 1883, to H. C. Simms, trustee, and the other to W. T. Thompson, trustee, dated July 13, 1883, and recorded November 30, 1883. The said Wilson and Beardsley having failed in business, they on December 9, 1884, executed to W. T. Thompson, trustee, a general assignment upon all their property, including the aforesaid mill-property. By direction of Biggs the trustee in the aforesaid trust-deed of July 13, 1883, W. T. Thompson advertised the said mill-property for sale; and thereupon Margaret Sands on January 31, 1885, filed her bill in the Circuit Court of Cabell county against said Wilson and Beardsley, Thompson, trustee, Biggs, and others, claiming that by virtue of the aforesaid trust-deed of May 19, 1880, to secure the debt due her she had a prior lien on said mill-property, and praying that the sale thereof be enjoined, until the validity of her lien could be adjudicated.

In her bill the plaintiff sets forth the above facts and avers, that the defendant Biggs, had constructive as well as actual notice of the existence of her said trust-deed, before and at the time the two trust-deeds aforesaid were executed to secure him. Biggs answered denying, that he had actual notice of the plaintiff's trust-deed, or that the recordation of her deed was constructive notice to him. He also denied, that he had either constructive or actual notice of the trust-deed to secure the debt held by George Sampson.

Upon the question of whether or not Biggs had actual notice of the plaintiff's trust-deed, the Circuit Court directed an issue out of chancery to be tried by a jury submitting two inquiries: *First*, whether or not Biggs had notice or knowledge of the plaintiff's trust-deed before the deed of February 9, 1883, to Simms was executed to secure said Biggs; and, *second*, whether or not Biggs had actual notice or knowledge of the plaintiff's trust-deed before the deed of July 13, 1883, to secure him, or before he had advanced all the money secured thereunder. The jury answered the first of these

inquiries in the negative, and the second in the affirmative. The defendant Biggs moved the court to set aside this finding of the jury, because the issue was improvidently awarded, and for other causes, which it is unnecessary to state. But the court overruled said motion and on January 17, 1888, entered a final decree in the cause, in which it decided, that the aforesaid trust-deed to secure the debt held by George Sampson and also the trust-deed to secure the plaintiff were valid and entitled to priority over the trust-deed of July 13, 1883, in favor of Biggs, and decreed accordingly.

It is from this decree that the defendant Biggs has appealed.

The decree of the Circuit Court as to the debt of George Sampson is plainly erroneous. There is no claim, that either Biggs or his trustee had any actual notice of the trust-deed securing this debt. It will be observed from the facts before stated, that this trust-deed was executed by W. B. Wilson on March 14, 1881, before the grantor had acquired any legal or recorded title. The grantor did not obtain the legal title, which was then in Russell and Miller, until it was conveyed to him by them by deed dated January 24, 1882, which was not recorded until June 1, 1882, after the Sampson trust-deed had been recorded. At the time Biggs obtained his trust-deeds, Wilson and Beardsley, his grantors, had the legal title to the property by deed duly recorded subsequent to the recordation of the Sampson trust-deed. Therefore according to our statute Biggs was not affected by the recordation of the Sampson deed, Code 1887; c. 74, s. 10, *Hoult v. Donahue*, 21 W. Va. 294.

It is also true, in respect to the trust-deed of Margaret Sands, that it was given by grantors on an equitable title only; and therefore its recordation could not under said statute operate as constructive notice to Biggs as a subsequent purchaser from Wilson and Beardsley, who had a duly-recorded legal title, at the time the Biggs trust-deeds were executed. But in respect to this latter it is alleged by the plaintiff, that Biggs had actual notice or knowledge of the existence of her deed, at the time he obtained his deed. If such is the fact, then the plaintiff's trust-deed being prior in time, whether recorded or not, must be given priority over the subsequent trust-deed of Biggs.

The important question then is: Did Biggs have such actual notice? To solve this question the court below directed an issue to be tried by a jury. The appellant here contends, that this issue was improvidently directed, because, as he insists, the evidence before the chancellor at the time did not warrant it. The law is well settled in this State, that, if the Circuit Court improperly directs an issue, its action will be reviewed and reversed by the appellate court, regardless of the verdict of the jury. Issues are not directed to enable the party to get additional evidence, and therefore, the propriety of directing an issue must depend upon the state of the proofs in the record at the time the order was made. *Anderson v. Cranmer*, 11 W. Va. 552; *Jarrett v. Jarrett*, Id. 384. No issue should be ordered, until the plaintiff has thrown the burden of proof on the defendant. *Beverley v. Walden*, 20 Gratt. 147; *Vangilder v. Hoffman*, 22 W. Va. 1.

On the question now before us William Sands, the husband of the plaintiff, testified, that some time during the summer of 1883 he and the defendant, William Biggs, met on Third avenue in Huntington; that they walked to the river-bank, and after some conversation "he (Biggs) asked me how the Biggs mill was going to do. I told him she would do well if she had capital. He then asked me whether or not my wife had a mortgage on the property, to wit, Biggs mill. I replied, 'Yes, a small one.'" Then, upon a direct question as to the time of this conversation, he says it was "about April or May, 1883." On the other side William Biggs, the appellant, testified, that he first heard of the Sands trust-deed from his daughter, Mrs. Beardsley, on the night of the 19th of July, 1884, after he had made the last loan to Wilson and Beardsley; that, at the time he took his last trust-deed, Wilson and Beardsley told him, that his was the first and only lien on the property, but that he did not then nor afterwards until after the assignment examine the records or have them examined to ascertain, if there were any liens on the property. On cross-examination he was asked: "In July, 1883, while you were in the city of Huntington, did not you have a conversation with Wm. Sands, on the bank of the Ohio river, below the C. & O. Ry. depot, in reference to the Sands deed of trust, in which you stated,

that you had loaned money to Wilson and Beardsley, and inquired of Sands, if his wife did not have a lien on the mill-property also, and Sands said, 'Yes, a small one,' or words to that effect?" to which he answered, "No; never had a conversation about it in my life."

This is all the testimony on the subject of notice. It is true, that after Biggs was informed, that the Sands trust-deed was on record at a date prior to his, he urged Wilson and Beardsley to pay it off, and did not until after the assignment of December 9, 1884, question its validity as a prior lien; but this is fully explained by the fact, that, until the record had been examined, and it was disclosed, that the record of the Sands deed did not constitute constructive notice to him, he not being a lawyer and being ignorant of the facts appearing upon the record supposed, that he was bound by the record, simply because the Sands deed had been recorded before his; that is, he, as he might well have done, believed, that he was chargeable with constructive notice of the Sands deed, although he had no actual notice or knowledge of its existence.

This being the state of the evidence, at the time the issue was ordered, it seems to me very clear, that the issue was improperly directed. The burden of proving actual notice to Biggs was upon the plaintiff. To meet this burden she offered but a single witness, who was her husband, and his evidence is directly and positively disputed and contradicted by the defendant. This simple assertion on the one side and denial on the other could not under any rule of testing evidence operate to shift the burden of proof but merely left the burden, as it was before this conflicting evidence had been offered, and consequently under the rule of law before stated, the burden not having been thrown by the plaintiff upon the defendant, the court erred in directing the issue.

For these reasons the said decree of the Circuit Court must be reversed, and the cause remanded for further proceedings in accordance with views expressed in this opinion.

REVERSED. REMANDED.

WHEELING.

LOW. v. SETTLE.

(SNYDER, PRESIDENT, Absent.)

Submitted January 14, 1889.—Decided June 28, 1889.

32	600
43	40
32	900
54	821
32	600
59	115

1. EJECTMENT—EVIDENCE—TITLE.

In ejectment, when both parties claim to derive title from the same third person, the rule is well settled, that it is *prima facie* sufficient for plaintiff to prove such common derivation of title without proving, that such third person had title to the land in controversy.

2. EJECTMENT--TITLE.

A plaintiff in ejectment against one in actual possession must recover on the strength of his own title, not on the weakness of his adversary's.

3. DEED—TITLE.

A deed conveying a tract of land by boundary, but excluding a tract of fifty acres theretofore sold to another other than the grantee in such deed, does not pass to such grantee legal title to said fifty acres, even though no deed for said fifty acres had been made to such other person, who purchased it.

J. W. Davis for plaintiff in error.

J. A. Preston for defendant in error.

BRANNON, JUDGE:

This cause has been before this Court heretofore, and the report of the decision then made is in 22 W. Va. 387, where many of its facts may be learned. It was in ejectment brought February 7, 1881, by Low against Settle in the Circuit Court of Fayette county. When the cause was remanded from this Court, a second jury-trial was had in that court. Both parties claimed under Sarah Stuart. In September, 1837, Seth Huse purchased from Sarah Stuart by written agreement out of a large tract fifty acres described simply as "fifty acres of land on New river, including the upper improvement, that John Scott has in possession." Huse sold Settle this fifty acres in 1845 by writing providing, that, when the purchase-money should be paid, Huse should

convey or cause it to be conveyed to Settle. The agreement between Huse and Stuart was a mere executory agreement not under seal, and provided, that Huse might take in more land at fifty cents per acre.

By Sarah Stuart's will she devised lands, of which she died seised, to her children and by a codicil empowered Samuel Price, her executor, "to convey any lands, that may be sold at the time of my death." These children had parties to divide this land between them, and they made a plat of the division, on which was marked, "Share E lot No. 5, 5,083½ acres, assigned to Agnes Peyton;" and on this plat within the boundaries of "Share E," appears a figure, bounding on New river, and on it the words and figures, "Harrison Settle, fifty acres."

On the 12th of August, 1859, these children of Sarah Stuart entered into a deed executing such partition conveying the lots to one another, whereby lot E aforesaid was conveyed to Agnes Peyton under the language,—“The tract or parcel of land designated in the report aforesaid as share E, lot No. 5, of the Loop lands, containing, exclusive of lands sold, 5,083½ acres, and bounded as follows:” inserting boundaries, which, as appears from said plat and the calls of the deed, follow the river and include this fifty acre Harrison Settle land.

By deed dated 22d April, 1874, Agnes Peyton and her trustees conveyed this lot 5 to Low reciting, that by re-survey it contained 6,375½ acres, “and, excluding 1,575 13–160 acres surveyed out, contains 4,792 107–160 acres;” and then giving boundaries, including the Settle tract. This deed to Low contained also the following language: “The lands included within the boundary aforesaid, which are surveyed out and excluded from the quantity sold and hereby conveyed, are the following, to wit: * * * And Harrison Settle fifty acres, among other parcels.”

In 1874 Settle employed a surveyor to survey the fifty acres, in order to obtain calls to get a deed for it, and the surveyor made a plat and delivered it to Settle, who took it to Price to obtain a deed. He was present at the survey and specifically directed how the lines should be run. He was told by the surveyor, that, as he wished it run, the improvement and his house would be left out, but he insisted upon

so running it. Settle as a witness denied this. Samuel Price, executor of Sarah Stuart, made Settle a deed by the calls of said survey for said fifty acres, which is dated April 3, 1874, but was not delivered to Settle until March 5, 1878, and recorded March 28, 1878. Settle claims that his land lies on New river, as represented by said figure on the plat of partition between the Stuart children, while plaintiff claims, it should be limited to the Price deed; and between the bounds of the Price deed and New river there would be about fifteen acres, which is the land in controversy, and includes the Scott improvement. We have not the aid of the plat filed in the action of ejectment made under order therein. The plaintiff disclaimed any land within the deed from Price to Settle, and Settle disclaimed any land not within the limits the figure marked, "Harrison Settle fifty acres," on said partition plat. Defendant Settle as a witness stated, that he had been in his possession of the land in controversy ever since 1845, when he entered upon it under his purchase from Huse, and that Huse had been in possession from the date of his contract with Sarah Stuart in 1837 down to the time, when he delivered possession to Settle in 1845; that the land in controversy is part of the land purchased by him of Huse and so held by him in possession and is covered by the Scott improvement. Settle signed the following writing on the back of the agreement between Huse and him, by which he purchased the land: "Rec'd of Harlow Huse, Samuel Price's executor's, deed for the within described land, this 5th March, 1878."

On the trial the court gave four instructions asked by plaintiff, to which the defendant excepted, and refused two asked by defendant, to which he also excepted. The jury returned a verdict for the land in the declaration specified in favor of plaintiff except the fifty acres described in the Price deed, which they found for defendant. Defendant moved for a new trial, which the court refused, and he excepted to this refusal, and judgment was rendered on the verdict, and Settle obtained this writ of error.

There were certain title papers given in evidence by plaintiff in the line of title prior to the ownership of Sarah Stuart, to which defendant objected as ineffectual to pass legal title,

and which the court told the jury were effectual to do so. But, as both parties claim under Sarah Stuart, the plaintiff need not have traced his title further back than to her, to show that she had title, *Laidley v. Land Co.*, 30 W. Va. 505, (4 S. E. Rep. 705), and we do not deem it necessary to decide the points raised by the first and second assignments of error.

Defendant assigns as error the giving of plaintiff's instructions Nos. 1, 2, and 4, and the refusal of defendant's instructions Nos. 1 and 2, as follows: Plaintiff's instructions:

"(1) If the jury believe from the evidence that the land in controversy is embraced in and conveyed by the deed from A. and H. Stuart, trustees, to Agnes Peyton, and by said Agnes Peyton and her children to the plaintiff, then they must find for the plaintiff, unless they further believe from the evidence that the defendant has been in exclusive, actual, continual, visible, and notorious possession of the land for more than ten years prior to the commencement of this action, claiming the same under claim or color of title, adversely to the title of plaintiff, and those under whom his title is derived; and the jury is also instructed that the claim of the defendant, Harrison Settle, derived from Seth Huse and his vendor, could not be adverse to the plaintiff, or those under whom he claims, until the deed of Samuel Price, executor of Sarah Stuart, was delivered to said Harrison Settle, and from that time it was adverse.

"(2) If the jury believe from the evidence that the defendant, Harrison Settle, entered into possession of the land in controversy under an executory contract, which left the legal title in his vendors, and contemplated a further conveyance of the complete title, his entry was in subordination to the legal title, and in that event a privity existed which precluded the idea of a hostile or tortious possession that could silently ripen into an adverse possession under the statute of limitations."

"(4) The court instructs the jury that if they believe from the evidence that the defendant, Settle, accepted the deed from Price, executor, to him, which was read in evidence, and surrendered the title-bond from Huse to him to said Huse, as satisfied by said deed, and that no fraud was used by either said Huse or Price to induce him to accept said

deed and surrender said title-bond, then they must find for the plaintiff the land in the declaration mentioned, except the land embraced in and conveyed by said deed, and that the defendant may have labored under a mistake as to the contents of said deed can make no difference in this action."

Defendant's instructions :

"(1) The defendant moved the court to instruct the jury that if they believe from the evidence that in the partition made between the devisees of Sarah Stuart, in 1857, the land in dispute was not divided, and that in the deed of partition between the said devisees of Sarah Stuart made on the 12th day of August, 1859, the land in dispute was regarded as sold land, then the title to the land sued for is not in the plaintiff, and they must find for the defendant."

"(2) That if the jury believe from the evidence that shortly prior to August, 1859, the devisees of Sarah Stuart made a partition of their lands, and on the map of partition a fifty acre tract was assigned to Harrison Settle, the defendant, and that by the deed of partition of 1859 between said devisees, as read to the jury, the said devisees excluded from the conveyance that fifty acres so assigned to Harrison Settle, and that said fifty acres covers the land now in dispute, and that Harrison Settle was in possession of the land in dispute on the day said partition was made, and remained in possession thereof continuously, claiming the same as his own and adversely until the day this suit was brought, then they should find for the defendant."

If we suppose the land in controversy to be land purchased by Huse of Stuart, and the plaintiff's deed conveyed it to him, then Settle would have only the equitable title, while the plaintiff would have the legal title, and defendant could not defend on this equitable title, because he had given no notice of such defence under Code 1887, c. 90, s. 22. But he relied on adverse possession. He could not in such case defend on that basis. He and his vendor, Huse, took and held possession under the title of Sarah Stuart under executory agreement with her contemplating and requiring future conveyance to pass title, and their possession was not adverse to her until at least the date of the Price deed, April 3, 1874, or rather the 5th of March, 1878, the date of its deliv-

ery, under the law as stated in *Core v. Faupel*, 24 W. Va. 239. There was evidence tending to this state of facts. For this reason we see no error in plaintiff's instructions Nos. 1 and 2.

As to the refusal of defendant's instruction 1: The plat of partition between the Stuart children does represent a figure as the Settle fifty acres; but the deed under it includes in its boundary that fifty acres, and the words, "containing, exclusive of land sold, 5,083½ acres," found not in the granting clause of the deed but in the clause giving quantity, do not exclude the fifty acres from the boundaries and the granting effect of the deed. This instruction assumes a state of facts, which there was no evidence to sustain, and is therefore irrelevant. *Bloyd v. Pollock*, 27 W. Va. 75. The same may be said of defendant's instruction No. 2.

As to plaintiff's instruction No. 4: As executor Samuel Price had power under the will of Sarah Stuart to convey land, which she in her lifetime had sold, not land which at her death she owned except that, which as executor he might sell. It appears, that the land included in the Price deed to Settle does not include the land sold to Huse; certainly not the Scott improvement. Could Price make a substitution, or both he and Settle, substituting for land, which Sarah Stuart sold, land she had not sold? It would seem not. It would not bind the devisees, and, if not them, it ought not to bind Settle, for it ought to be mutual. It could not pass legal title. The instruction required the jury by force of that deed to find for the plaintiff, if the facts were as therein assumed. It should not have been given.

As to the motion for a new trial: The deed from Price to Settle, dated April 3, 1874, was not delivered to Settle till March 5, 1878, and that from Peyton and others to Low is dated 22d April, 1874. The words quoted above from the deed to Low exclude from its operation some land referred to therein as the Harrison Settle fifty acres, and therefore it does not pass title to Low. To what does this excluding clause refer? We think it refers to the fifty acres sold to Huse and by him to Settle. The agreement by which Huse purchased is indefinite in its description of the land, general and uncertain, but certainly includes the Scott improvement, though beyond that uncertain; and these exclud-

ing words in the deed to Low would have the effect to exclude that improvement, of which Settle was in possession, and to that extent at least plaintiff had no legal title and could not recover, as a plaintiff in ejectment must recover on the strength of his own title not on the weakness of his adversary's. The motion for a new trial should have been sustained.

Therefore the judgment is reversed, the verdict set aside, a new trial awarded and the cause is remanded to the Circuit Court to be further proceeded in according to the principles herein indicated, and otherwise according to law. The plaintiff in error, Settle, recovers his costs here.

REVERSED—REMANDED.

WHEELING.

STATE EX REL. v. PECK.

Submitted June 10, 1889. —Decided June 28, 1889.

1. BOND—PLEADING—REMOVAL OF CAUSES.

Where a suit is brought in a State court and the defendant has been arrested and under the Code, c. 106, s. s. 31, 32, has given bond to answer interrogatories filed before a commissioner of said court or in default thereof to satisfy the decree rendered in said suit, a plea setting up the fact, that said suit has been removed to the United States court, and that no decree has ever been rendered in said suit by the State court, is immaterial.

2. BOND—PRINCIPAL AND SURETY.

In such case, if a decree has been rendered by the United States court against the defendant, and he fails to answer interrogatories filed before a commissioner of the State court, as required in the condition of said bond, he and his sureties upon said bond will be liable for the amount decreed against him in the United States court.

A. F. Mathews for plaintiffs in error.

J. W. Harris for defendants in error.

ENGLISH, JUDGE:

This was an action of debt brought in the name of the State by Levi Witz, Isaac Witz, William T. Beidler and S.

R. Tregallas, partners in trade under the name, style and firm of Witz, Beidler & Co. against H. A. Peck and others, his sureties, upon a bond with collateral conditions executed, in pursuance of the Code, c. 106, s. 33. It appears, that Witz, Beidler & Co. had instituted a suit in chancery in the Circuit Court of Monroe county against H. A. Peck and others, for the purpose of collecting a debt due from him to them for merchandise amounting to the sum of \$1,942.18, and also for the purpose of setting aside certain assignments and conveyances therein mentioned, and alleged to be fraudulent; and that in this chancery proceeding the plaintiffs caused an order of arrest to be issued under the provisions of the Code c. 106, s. s. 30, 31, under which said H. A. Peck was taken into custody and gave the bond with security in pursuance of section 83 aforesaid upon which this suit is predicated, in pursuance of section 33 aforesaid.

The defendants tendered six pleas in writing, and the plaintiffs replied generally to pleas Nos. 1 and 2, which were covenants performed and covenants not broken, respectively; and issues were therein joined. Plaintiffs objected to the filing of pleas 3, 4, 5, and 6, and the court sustained the objection to pleas 3, 5, and 6, and refused to allow them to be filed, and overruled the objection to plea No. 4, allowing it to be filed, to which ruling of the court the plaintiffs excepted.

Plea No. 4 is as follows: "And the said defendants by their attorneys come and pray over the said supposed writing obligatory, and of the condition thereof, which is read to them, and is in the following words: 'Know all men by these presents, that we, H. A. Peck, W. G. Hudgin, W. M. McCormick, George T. McClintoc, Charles H. Hedrick, George W. Graves, Clark Howell, M. M. Ogg, J. N. Alderson, N. B. Sheppard, J. C. Bright, and John Keeney, are held and firmly bound unto the state of West Virginia in the sum of four thousand dollars, to the payment whereof well and truly to be made to the said state we bind ourselves, our heirs and personal representatives, jointly and severally, firmly by these presents. Sealed with our seals and dated this 31st day of December, 1885. The condition of the above obligation is such that whereas, the above-bound H.

A. Peck has been arrested by the sheriff of Monroe county under an order of arrest issued from the clerk's office of the Circuit Court of Monroe county, W. Va., on the 30th day of December; 1885, in the suit of Witz, Beidler & Co. against H. A. Peck and others; now, in case there shall in the said suit be any decree or order on which a writ of *feri facias* may issue, and within four months after such decree or order is rendered or made, interrogatories be filed, under the fourth section of chapter one hundred and forty one of the Code of West Virginia, with a commissioner of the Circuit Court of said county of Monroe, the said H. A. Peck will, at the time the commissioner issues a summons to answer such interrogatories, be in the said county, and will within the time prescribed in such summons file proper answers upon oath to such interrogatories, and make such conveyance and delivery as is required by the said chapter, or, in case of failure to file such answers and make such conveyance and delivery, that the defendant H. A. Peck will perform and satisfy the said decree or order; now, if the above-bound H. A. Peck shall perform said conditions, then the above obligation to be void; else to remain in full force and effect.' For further plea they say, that the plaintiffs ought not to have or maintain their action aforesaid against them, because they say that to the said supposed writing obligatory in the declaration mentioned there were annexed certain conditions and stipulations, which are in the words following, to-wit: 'Now, in case there shall in said suit (meaning a certain suit then pending in the Circuit Court of Monroe county in which the said Witz, Beidler & Co. were plaintiffs, and said H. A. Peck and others were defendants, under proceedings in which said suit said supposed writing obligatory was executed) be any decree or order in which a writ of *feri facias* may issue, and within four months after such decree or order is rendered or made interrogatories be filed under the 4th section of chapter one hundred and forty one of the Code of West Virginia with a commissioner of the Circuit Court of said county of Monroe,' that then the said H. A. Peck, at the time the commissioner issues a summons to answer such interrogatories, or these defendants would perform certain other conditions therein specified,

and these defendants say that the said conditions and stipulations above set forth were conditions precedent to the performance of the conditions to be fulfilled and performed upon the part of these defendants, and that these defendants could not perform and fulfill, and were not in law bound or obliged or could be required to perform or fulfill, the conditions imposed on them, except and until said conditions precedent were performed and fulfilled; and these respondents say that said conditions precedent never have been performed or fulfilled, and they are ready to verify."

The action of the court below in overruling the objection of the plaintiffs to plea No. 4, and allowing the same to be filed is assigned as error. It appears, that during the pendency of said chancery-suit the defendant H. A. Peck appeared in the Circuit Court of Monroe county and moved to quash the attachment, which had been issued therein, and that he also filed a plea in abatement at rules in said cause; and that on the 18th day of March, 1888, all of the defendants filed their answers in said cause, which were replied to generally; and on the same day upon petition of the plaintiffs said chancery-suit was removed to the District Court of the United States for the district of West Virginia, sitting at Charleston and exercising Circuit Court powers; and that subsequently the defendants appeared in said chancery-suit in the United States district court, and a decree was rendered in favor of plaintiffs against said H. A. Peck for the sum of \$2,148.36, and execution was directed to issue for the said sum thus decreed with interest and costs against said H. A. Peck, and the cause was dismissed as to the other defendants; and on the 2d day of January, 1888, a summons was issued by P. Fontaine, commissioner of said United States court, requiring said Peck to appear before him at his office in the city of Charleston, Kanawha county on the 14th day of January, 1888, at 10 o'clock A. M., to answer certain interrogatories, a copy of which accompanied said summons, which had been filed with him by the plaintiffs in said chancery-suit, which summons was returned by the United States marshal of said district, "Not found in his district;" and a like summons was issued by M. J. Kester, commissioner of the Circuit Court of Monroe county, reciting the fact, that a de-

cree had lately been rendered against the said Peck by said United States District Court, and commanding him to appear before said commissioner at his office in the town of Union, Monroe county, W. Va., and answer under oath certain interrogatories, which had been filed with him by the plaintiff in said chancery-suit, which summons was returned by the sheriff of Monroe county, "Not found."

Did the court below err in overruling the objection to said plea No. 4? In considering this question it is necessary to look to and consider the legal consequences of the removal of a cause from a State court into the United States court. It is true, that this chancery-suit was pending in the Circuit Court of Monroe county, W. Va., at the time the defendant Peck was arrested, and the bond was executed, in order that he might be released; and it was not then known or perhaps contemplated, that the case would be removed to the United States court; and the wording of the condition of the bond seems to indicate that it was expected that the case would be proceeded in to final decree in the Circuit Court of Monroe county, but, said cause having been removed to the United States court, we look to the statute in pursuance of which it was removed, and find that "when any suit shall be removed from a State court to a Circuit Court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner, as by law they would have been held to answer final judgment or decree, had it been rendered by the court, in which such suit was commenced; and all bonds, undertakings or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal." Sec Supp. Rev. St. U. S. p. 175, § 4. Referring to the Code, c. 141, § 4 we find: "The judgment-creditor may file interrogatories to the debtor and a copy of the judgment with a commissioner of the court wherein the judgment is, or of the circuit court of the county in which the defendant resides or may be found, who shall issue a summons directed," *etc.*

When the bond, on which this suit is predicated, was

executed, the obligation was entered into both by the principal and sureties under the light of these statutes, which formed a part of their contract. In the event of a removal to the United States court the law told them the consequences, that the bond would go with the suit and remain valid and effectual; and, although it was contemplated at the time, when the bond was given, that the judgment would be rendered in the State court, yet the said Peck and his sureties executed said bond with a full knowledge, that the case could be removed to the United States court, and that if it should be so removed and a judgment should be rendered therein, the obligation of said bond could be enforced against them, unless the condition was complied with by answering said interrogatories, where the law provides they should be answered, before a commissioner of the court, wherein the judgement is. I therefore, think that it was not a condition precedent to the recovery in this action, that interrogatories should be filed before a commissioner in said county of Monroe, or that the defendant, Peck, should be summoned before such commissioner in Monroe county to answer the same; but if such was the case, he had an opportunity of complying with the condition of his bond by being in the county of Monroe and answering the interrogatories, which he was summoned to answer before a commissioner of that county within four months after said decree was rendered.

In the case of *Levy v. Arnsthall*, 10 Gratt. 641, the court in the first point of the syllabus hold, that the act of March 31, 1851, (a statute very similar to the one under consideration,) authorizing a plaintiff in an action to require security in certain cases from the defendant, constitutes the relation of principal and bail between the defendant and his surety, and it is the right of the surety to surrender his principal; and in the second point of the syllabus the court hold, that by the act of April 16, 1852, c. 92, § 4, p. 77, authorizing the plaintiff to file interrogatories to a defendant in custody, and authorizing the court upon notice to the plaintiff or his attorney to discharge defendant from custody applies to a defendant in custody of his bail as well as a defendant in jail.

The order of arrest provided in the Code c. 106, s. s. 31,

32 was intended as a substitute for the writ of *capias ad respondendum*; and it will be noticed that section 31 provides, that "when sufficient cause shall be shown for the arrest of a defendant as aforesaid, such court, judge or clerk shall make an order directing the defendant to be arrested and held to bail for such sum, as the said court, judge or clerk shall think fit; and the plaintiff shall thereupon deliver to the clerk of the court, in which the action is pending a bond in the penalty of double the amount sworn to," etc.; and after the defendant has been arrested, if he gives bond, he is relieved from the necessity of going to jail but is still considered to be in custody of his sureties, who have covenanted, "that in case there shall be in the action or suit any judgment, decree or order, on which a writ of *feri facias* may issue, and within four months after such judgment, decree or order is rendered or made, interrogatories be filed under the fourth section of chapter 141 with a commissioner of the court wherein such decree or order is, the defendant will at the time the commissioner issues a summons to answer such interrogatories be in the county, in which such commissioner may reside, and will within the time prescribed in such summons file proper answers, etc. and make such conveyance and delivery, as is required by said chapter, or in case of failure to file such answer or make such conveyance and delivery that said defendant will perform and satisfy said judgment, decree or order;" and by section 35 of the same chapter the court; in which a case is pending or the judge thereof in vacation may after reasonable notice to the plaintiff or his attorney or counsel quash the order and discharge the defendant from custody or discharge the bond on being satisfied, that the same was wrongfully obtained, etc.,—thus giving the defendant or his sureties an opportunity at any time to test the validity of said bond or show, that it was obtained upon false suggestions.

This suit was instituted in Monroe county, the declaration was filed in the Circuit Court of that county, and the arrest was made in that county, and, at the time the bond was given, it was contemplated, that the suit would terminate in that county, and for that reason the condition of the bond provides, that the interrogatories should be answered before

a commissioner of that county; but the law, which formed a part of the contract, and which the obligors in said bond are bound to take notice of, provides, that the defendant may be discharged from the obligation of said bond, in case there shall in the action or suit be any judgment, decree or order on which a writ of *feri facias* may issue and said defendant shall within four months after such judgment or decree is rendered or made, and interrogatories be filed under the fourth section of chapter 141 of the Code, with a commissioner of the court, wherein such judgment, decree or order is, and, at the time the commissioner issues a summons to answer such interrogatories, by being in the county in which such commissioner resides.

While it is true that this decree was rendered in the United States court, and a writ of *feri facias* was directed to issue by that court, this decree was rendered on the 3d day of November, 1887; and on the 4th day of December, 1887, a summons was issued by M. J. Kester, commissioner of the Circuit Court of Monroe county, requiring said H. A. Peck to appear at his office, in Union, Monroe county, W. Va., on the 21st of December, 1887, to answer under oath interrogatories, which had been filed with him by the plaintiffs, Witz, Beidler & Co., etc., reciting that a decree had been rendered against said H. A. Peck by the District Court of the United States, which summons was accompanied by a copy of said interrogatories, which summons was returned by the sheriff of that county, "Not found in my balliwick." A like summons was issued by a commissioner of the United States court, accompanied by said interrogatories and placed in the hands of the United States marshal within four months after the date of said decree, and returned, "Not found." By said fourth section of chapter 141 that the interrogatories may be filed with a commissioner of the Circuit Court of the county, in which the defendant resides or may be found.

The place of H. A. Peck's residence was Monroe county, and within four months, after this decree was rendered, these interrogatories were filed before a commissioner of the Circuit Court of Monroe county, and a summons issued requiring him to appear and answer the same on oath on the 21st day of December, 1887, and the sheriff returns him, "Not

found." If the commissioner of the United States court had issued no summons, I regard said Peck's absence from Monroe county, when the summons was issued by Commissioner Kester, a breach of the conditions of said bond. I do not regard the matters set forth in said plea No. 4 as constituting any defence to said action. It presents an immaterial issue, and should have been rejected.

In the case of *Hopkins v. Richardson*, 9 Gratt. 486, eighth point of syllabus, the court held: "The admission of an improper plea is error, and the appellate court will not inquire, whether or not the plaintiff could be injured by its admission."

The judgment of the court below must be reversed, and, the amount of costs recovered by the plaintiffs by the decree rendered in the United States District Court, not appearing in the record, this cause is remanded to the Circuit Court of Monroe county with directions to render judgment for the amount of the decree recovered in the United States District Court and the costs recovered in said court.

REVERSED. REMANDED.

WHEELING.

NORMAN v. BENNETT.

*(GREEN, JUDGE, absent.)

Submitted June 18, 1889.—Decided June 28, 1889.

1. SPECIFIC PERFORMANCE—STATUTE OF LIMITATIONS.

J. M. B. by his attorney in fact, T. M., executed a title-bond to J. J. N., dated September 18, 1848, in which is recited the fact, that J. M. B. by his attorney, T. M., had bargained and sold unto the said J. J. N. 150 acres of land more or less lying in a certain boundary situate on the right-hand fork of Steer run, for the consideration of one dollar *per* acre, and said B. binds himself upon the payment of the purchase-money to make unto said J. J. N. a good and sufficient title to the said 150 acres of land to be laid off in an oblong square, and shortly afterwards said attorney

*On account of illness.

in fact surveyed and marked said 150 acre tract, and J. J. N. took possession and lived upon the same and cultivated and improved it until his death, which occurred in 1885, and on the 17th day of August, 1852, J. M. B. receipted to J. J. N., for two notes on J. L. aggregating \$120.00, which when collected were to be applied on said purchase-money, which notes, the evidence shows, were collected by said J. M. B., who admits in his answer to a bill filed to specifically enforce said contract, that said title-bond dated September, 1848, was treated as ratified. *Held*: In a suit brought in June, 1875, by the heirs-at-law of J. J. N., to enforce specific performance of the contract the plaintiffs were entitled to specific performance of said contract under the circumstances proven in the case, and said claim is not barred by the lapse of time or the statute of limitations.

Kidd & Johnson for appellants.

L. Bennett for appellees.

ENGLISH, JUDGE:

This was a suit in equity brought by Jasper Norman and others against Jonathan M. Bennett and others in the Circuit Court of Gilmer county to enforce the specific execution of a contract alleged to have been made in writing between James J. Norman and said J. M. Bennett acting by Thomas Marshall, his attorney in fact, on the 18th day of September, 1848, for the purchase of a tract of land containing 150 acres, situated on the right-hand fork of Steer run for the consideration of one dollar per acre. It is further alleged, that on the 17th day of August, 1852, the said James J. Norman assigned and transferred to the defendant J. M. Bennett two bonds or notes on one James Long,—one for \$45.00, due 1st of September, 1852, and the other for \$75.00, due the 1st day of September, 1853,—which bonds bore date September 1, 1849, and were to be “applied as a credit on bonds executed by said James J. Norman to said Bennett for the purchase of 150 acres of land on Steer run, a branch of the left-hand fork of Steer creek, which bonds have long since been paid;” that said tract of land was to be laid off in an oblong square, and was a part of 766 acres granted to said Bennett by the commonwealth of Virginia; that soon after the said purchase the said James J. Norman moved upon and took possession of said tract of land and lived upon the same and made valuable improvements thereon and continued to reside

thereon until his death in 1864 or 1865; that on the 17th day of September, 1866, the said J. M. Bennett in consideration of \$150.00 conveyed to the defendant Elijah G. Norman 187 acres of land, which includes said tract of 150 acres; that the said E. G. Norman had full notice and knowledge of the sale of said tract of land by said Bennett to James J. Norman before he purchased the same, and the plaintiffs charge, that there was a written agreement between Bennett and E. G. Norman to the effect, that, if the heirs of James J. Norman ever sought and recovered said land, Bennett was to pay back to Norman a stipulated sum; that before any purchase-money was paid, the said Thomas Marshall, as agent of said Bennet, and a surveyor went upon said land so purchased by J. J. Norman, and surveyed and laid off the same by metes and bounds, and marked the corners and lines thereof, and the plat of said land made by Marshall was delivered to J. J. Norman, and remained in his possession until his death, since which time it has been lost or mislaid, and from that time until his death said J. J. Norman enjoyed peaceable possession thereof by actual residence and cultivation and by clearing out and making large and valuable permanent improvements thereon, and that at the time of his death said land was worth \$1,500.00 or \$2,000.00.

Calhoun Norman, one of the heirs of Elijah G. Norman, deceased, filed an answer to the original and amended bills of plaintiffs denying the allegations therein contained; and J. M. Bennett filed his answer to the amended bill filed by plaintiffs denying, that Thomas Marshall was ever his attorney in fact with power to sell his lands, except that any sale made by Marshall was subject to his approval and ratification, and unless so ratified such sale was not to be obligatory upon him. He admits in his answer, that the title-bond bearing date on the 18th of September, 1848, as he believes was treated as ratified but alleges, that the 150 acres therein described was part of the tract of 300 acres acquired by said James J. Norman sold for the purchase-money under a decree of said court. He also admits, that he received on the 17th of August, 1852, two notes of James Long,—one for \$45.00 due September 1, 1852, and the other for \$75.00, due September 1, 1853,—which, when collected, he was to

apply as a credit on the bonds of said Norman for a piece of land on Steer run, for which notes he gave a memorandum in writing as a private individual, and not as an attorney, it being understood at the time that he did not practice law in Randolph county, where the debtor resided, and he did not therefore undertake to collect the same; that it was agreed that the notes should be placed in the hands of Caleb Boggess, who practiced law in Randolph county; that said notes were placed in said Boggess's hands, but whether he collected them defendant does not know, but he denied having collected any part of said money for said notes; that said Boggess shortly after moved to the city of Richmond, and did not return until after the war, and he does not know what disposition said Boggess made of said notes. He, however, denies that said notes were assigned to him, and says he was only acting in the capacity of a friend to carry the notes to said Boggess, and was to credit the said Norman when he received the money. He further alleges, that, if this claim was legitimate against him, it should have been presented before a commissioner having the accounts between Camden, Despard & Bennett against James J. Norman before him for adjudication; and, having failed to present the claim, or having presented it, as the case may be, it is too late now to do so, and he relies upon the statute of limitations, and claims that the plaintiffs' demand is a stale one, and that it has been adjudicated between the parties. He admits, that said Norman moved on the land, but insists, that the land was sold for the purchase-money, and that the tract sold to Elijah G. Norman was a tract altogether different from any tract or tracts sold to James J. Norman.

These answers were replied to generally, and on looking to the proofs in the cause we find, that the plaintiffs filed with their amended bill, as Exhibit 1, a title-bond, which appears to have been signed by J. M. Bennett and by Tom Marshall, attorney in fact, bearing date the 18th day of September, 1848, reciting, that said Bennett by his said attorney had sold to J. J. Norman 150 acres of land on the right-hand fork of Steer run for the consideration of one dollar per acre, payable in three annual installments from the 18th day of September, 1849, to the 1st day of October, 1851, bind-

ing said Bennett on the payment of said purchase-money to make unto said James J. Norman a good and sufficient title to the said 150 acres of land laid out in an oblong square, situated as above described. The plaintiffs also exhibit with said bill as Exhibit No. 2 the receipt of said Bennett for said notes describing them and stating therein, that when collected they were to be applied as a credit on a bond executed to him by said James J. Norman for a piece of land on Steer run, a branch of the left-hand fork of Steer creek.

The plaintiffs also file with their amended bill a deed made by said J. M. Bennett and wife to Elijah Norman for a tract of land containing 187 acres, 1 rood, and 25 poles, as a part of a tract of 766 acres patented to said Bennett, described as located on the waters of Steer creek, which deed bears date September 17, 1866, and which, plaintiffs allege, include the 150 acres sold by said title-bond to J. J. Norman by said Bennett, acting by Thomas Marshall, his attorney in fact. The plaintiffs also file as Exhibits 4 and 5 with their amended bill a copy of the decree in the suit of *G. D. Camden and J. M. Bennett v. James J. Norman Administrator and others*, directing a sale of a tract of 300 acres of land on Steer creek, which appears to have been sold for purchase-money amounting to \$529.89 due the plaintiffs, Camden & Bennett, also a copy of the report of sale; and the commissioner's deed was also filed therewith, showing that E. G. Norman became the purchaser for \$700.00 and that the same was conveyed to him by special commissioner, from which it will be perceived, that the tract of 150 acres contracted to J. J. Norman by said Bennett, acting by Marshall, his attorney in fact, was a different tract belonging to said Bennett and patented to him individually, as is shown by the face of the deed from said Bennett and wife to E. G. Norman for the tract of 180 acres, which includes the tract of 150 acres and was not the joint property of Bennett and Camden.

In support of the allegation in plaintiff's amended bill, that E. G. Norman had notice of the title and claim of said James J. Norman, before said conveyance was made to him by said J. M. Bennett and wife, Jasper Norman a witness for plaintiffs, was asked: "Do you know whether

or not the defendant, E. G. Norman, knew your father resided on the land in controversy before his death and before the purchase of the said E. G. Norman from the defendant J. M. Bennett?" and answered: "He was at my father's residence several times during his lifetime and had dealings with him up to the time of his death." He was also asked: "Do you know whether or not the said E. G. Norman knew of your father's purchase and claim of the land in controversy?" and answered: "I have heard him say quite recently, that he knew my father had bought and claimed the land, before he (E. G. Norman) purchased it of defendant Bennett." He also states, that his father resided on the land in controversy for about fourteen years. He also proves, who were the heirs at law of said J. J. Norman, who appeared as plaintiffs in this suit. It is also shown by the evidence of Milton Norris, a witness introduced by plaintiffs, that J. J. Norman resided on Steer run, a branch of Steer creek, near its head on a tract of land, which is now occupied by E. G. Norman; that he understood him to occupy the same as owner; that he lived there some twelve years, claiming the land as his own; that E. G. Norman is now in possession of the land, and claims it under a purchase from said Bennett; that he had in his possession the agreement between Bennett and E. G. Norman for the land in controversy and read it several times but does not recollect the date; that he does not know what became of said agreement; that he gave it to a gentleman who came around as the agent of Despard, and he was to give it to J. M. Bennett; that in that agreement E. G. Norman purchased two tracts of land,—one containing 300 acres; also a tract of 150, 160 or 170 acres, known as the "Jim Norman Tract." The 300 acre tract he sold as the land of Bennett, Despard & Camden, and the other tract he sold in his own right; the tract sold in his own name or right being the Jim Norman tract. He reserved in his agreement time to consider, whether he would consummate the sale or not. The bond went on to show, what sum said Bennett was to pay back to said Norman, if he did not choose to consummate the sale of the land.

Several of the questions asked these witnesses were ex-

cepted to by the defendant Calhoun Norman because of their leading character, and several of the answers were objected to, because they gave the witness's understanding of the matters inquired about. I have examined the questions objected to as leading and do not think they suggest the answer desired, or that the defendant was prejudiced by allowing them to be answered; and I think, the witnesses could properly give their understanding of the matters in response to the questions asked them, as by giving their answers in that way they were not expressing an opinion.

Said defendant also excepts to the questions seventeen and nineteen, asked Milton Norris, because they refer to a written agreement, which was not produced. It will however be seen, that said agreement had been sent to the defendant, Bennett and has since been produced and is an exhibit in the cause; so that the defendants were not prejudiced by said answer. It is also shown by the evidence of John E. Hays, that he not only had in his possession a receipt for a title-bond executed by Thomas Marshall as agent for J. M. Bennett to James J. Norman for 150 acres of land on the headwaters of the left-hand fork of Steer run, a branch of the left-hand fork of Steer creek, for which the said James J. Norman was to pay one dollar per acre; also that the said Norman at the same time produced a receipt in the handwriting of J. M. Bennett and signed by him for two bonds executed by said James Long to said James J. Norman, the amount of which he did not remember, but his recollection was that said bonds, if solvent, would pay off and discharge the land debt all but about \$30.00; that it would lack about \$30.00 of paying for the land named in said title-bond, and these bonds were to be applied according to Bennett's receipt, when collected, as payments on the land,—the said 150 acre purchase; that in a subsequent conversation with said Bennett he said he had never got any of said money; that he had put said bonds, or one of them,—did not then remember which,—in Count Stover's hands for collection, and Count had collected one of the bonds and had used the money and had never paid him. James Long states in his deposition, that the \$45.00 bond was paid about the year 1852, and the \$75.00 bond was paid the next year, which

made \$120.00 which went to the use of Bennett; and his wife, Barbara Long, stated the same thing.

From this evidence it is apparent, that said J. M. Bennett on the 18th day of September, 1848, contracted in writing to sell J. J. Norman a tract of land on the right-hand fork of Steer run for the consideration of one dollar per acre; said land to be laid off "in an oblong square;" and agreed to make him a good and sufficient title to the same upon the payment of the purchase-money. It is true, that said Bennett denies in his answer to the amended bill, that Thomas Marshall, who signed said Bennett's name, and affixed his seal to said agreement, was ever his attorney in fact with power to sell his lands, except that any sale made by him was subject to the approval and ratification of said Bennett, and, unless so ratified, was not to be absolutely obligatory upon him, but said Bennett admits in his answer to the plaintiffs' amended bill, that he believes the title-bond bearing date on the 18th day of September, 1848, was treated as ratified, but claims the 150 acres therein mentioned was part of the 300 acre tract.

Yet in Bennett's answer to the original bill he admits, that he did sell two tracts of land on Steer run of Steer creek in Gilmer county to James J. Norman; that he does not remember the quantity in either tract, and calls for the production of the title-papers not to furnish evidence of the sale, but of the conditions of the sale; that he is quite sure, that he received no part of the purchase-money on either tract, and that he filed his bill to enforce the payment of the purchase-money in said Circuit Court, and a decree was rendered for the sale of both said tracts, and they were sold, and the sale confirmed by the court, and that upon a balance struck the plaintiffs would be found to be in his debt; but on examining the decree, which is filed as Exhibit No. 4 with plaintiffs amended bill, we find that G. D. Camden and J. M. Bennett were plaintiffs in the suit against J. J. Norman's administrator and others, and that a 300 acre tract of land on Steer creek was directed to be sold for the purchase-money thereof, amounting to \$529.89 instead of the 150 acre tract; and by the report of the special commissioner appointed to sell the same it appears to have brought \$700.00 and Elijah G. Norman became the purchaser.

It is also clear that said J. M. Bennett approved and ratified the action of Marshall in making the sale of the 150 acre tract of land to J. J. Norman, by receiving the notes of Long, amounting to \$120,00 as part of the purchase-money, to be credited on the bond executed to him by said Norman when collected, as shown by his receipt filed with plaintiff's amended bill. And it appears by the evidence of Isaac Norman, that J. M. Bennett stated to him, that he had got part of the money and part he had not got; and though it appears from the evidence in the cause, that said J. M. Bennett intrusted the collection of said Long notes to an attorney, who collected and used part of the money and never accounted to him for it, yet it is clear, that, when the money was collected by said attorney, he received it as the agent of Bennett, and so far as J. J. Norman was concerned, when the money went into the hands of Bennett's attorney, Norman was entitled to credit for it on his indebtedness for the purchase-money of said land, because, if Bennett selected agents, who were not trustworthy, to transact his business, who collected and spent the money, the loss ought not to fall on Norman. It also appears that in pursuance of said sale James J. Norman took possession of the 150 acre tract of land, as it was surveyed by some surveyor for him in the shape of a parallelogram; and Levi Boggs, a witness, who testified in the case, states, that the widow of said J. J. Norman placed in his hands a plat of said land, which upon calculation he found to contain 149 acres.

The report of O. H. P. Lewis, surveyor, who surveyed said tract under an order of court in said suit, states, that on the 11th of May, 1886, he found an old marked line and ascertained, that the rectangle claimed by plaintiff contained 169 acres. The witness Milton Norris states, that in the year 1855 he ran a part of the lower line, and since the war he ran around the entire tract for E. G. Norman and in his last survey found the original lines but found them longer than the calls and containing more acres than was originally estimated. James J. Norman remained on said land until his death in 1865 and made valuable improvements on it; and on the 6th day of November, 1865, said J.

M. Bennett entered into an agreement with Elijah G. Norman to sell him said 300 acre tract and also said 150 acre tract, which, he says on the face of said agreement, James J. Norman claims to have purchased from J. M. Bennett through his agent, lying near said 300 acre tract, for \$150.00, which the said Bennett not having authorized reserves time to consider, whether he will recognize or confirm, or in any manner give it validity. In the mean time said E. G. Norman was to take possession of the land, improve it, and otherwise use the said last-mentioned tract as he might deem best, and was to continue to occupy it for such time as might be consistent with said contract; and we find in said agreement the following: "In consequence of the insolvency of the said James J. Norman it is known that the 300 acre tract of land must be sold to satisfy the vendor's lien, and the last tract (meaning the 150 acre tract) must be either sold for the supposed purchase-money, or be cancelled, *etc.* This agreement was signed by both J. M. Bennett and Elijah G. Norman; and on the 17th day of September, 1866, said J. M. Bennett and wife seem to have conveyed a tract of land containing 187 acres, 1 rood, and 25 poles, which the evidence shows includes said 150 acre tract to E. G. Norman for the consideration of \$150.00.

Although the agreement between J. M. Bennett and J. J. Norman never was recorded, the defendant E. G. Norman can not claim, that he was a purchaser without notice, because it appears, that James J. Norman resided on the 150 acre tract of land until the time of his death, and, although one of the witnesses states, that he died in 1864 or 1865, he was living at the date of said agreement between J. M. Bennett and E. G. Norman; for the agreement recites, that said James J. Norman claims, that on the 18th day of September, 1848, he purchased said land from J. M. Bennett through his agent, and that James J. Norman is insolvent, and the land must be sold for the supposed purchase-money, or be canceled; and Jasper Norman, a son of said James J. Norman, states in his deposition that said E. G. Norman "was at his father's house several times during his lifetime, and had dealings with him up to the time of his death." See the case of *Campbell v. Fetterman's Heirs*, 20 W. Va. 399, 6th point of syllabus,

where this Court holds that "a person in possession of real estate is sufficient notice to a purchaser contracting with a claimant of such real estate not in possession, to put him on the enquiry, and, if he takes a conveyance from such claimant, he will be charged in favor of the person so in possession with all the information such enquiry would have given him if diligently pursued." See also *Manufacturing Co. v. Coal Co.*, 21st point of syllabus, 8 W. Va. 409, and *Frame v. Frame*, *supra* p—— (9. S. E. R. 901.)

The next question for consideration is: Does said written contract possess that degree of certainty, required in contracts of this character, in order that they may be specifically enforced in a court of equity? This Court in the case of *Mathews v. Jarrett*, 20 W. Va. 422, uses the following language: "It is an elementary principle that a contract which a court of equity will specifically enforce must be certain as well as fair in its term; and the certainty required has reference both to the description of the property and the estate to be conveyed. Uncertainty as to either, not capable of being removed by extrinsic evidence, is fatal to any suit for a specific performance," and such extrinsic evidence, the court further says, is strictly confined in cases, where no fraud, mistake or other equitable incident of a similar character is alleged, to the function of explanation and of exhibiting the surrounding circumstances, *etc.*

In this case the agent of Bennett went upon the land in pursuance of the contract and surveyed and marked it; and the surveyor in making his report directed in this case speaks of a corner made by Thomas Marshall for J. J. Norman; and J. M. Bennett in the written contract made with E. G. Norman on the 6th of November, 1865, mentions that J. J. Norman claims, that he purchased the tract of land, on which he then resided near the 300 acre tract through Bennett's agent for \$150.00; said J. J. Norman had been living on said land and claiming it as his own and making improvements on it for nearly seventeen years; said Bennett had ratified the acts of his agent Marshall by receiving all of the purchase-money but \$30.00. When said tract of land was actually run off to James J. Norman does not appear, but Milton Norris says in his deposition, that he had

run a part of the lower line as early as 1855, and since the war he ran around the entire tract and found the original lines. It must be presumed, that this land was run off to said James J. Norman by Marshall about the time the agreement was made, and Norman took possession of the land then pointed out and designated by Bennett through his agent, Marshall, and after said tract of land was so laid off and accepted by James J. Norman, the survey became a part of the contract, and Norman could not claim beyond its limits; neither could Bennett as the owner of the 766 acre tract, of which said 150 acres were originally a part, claim any portion of the boundary so separated from the larger tract.

Another circumstance of importance in this case is, the fact that in August, 1852,—about four years after the contract was made,—J. M. Bennett receipted to James J. Norman for \$120.00 in notes on said James Long, which, when collected, he agreed to apply as a credit on the bond executed to him by said Norman for a piece of land on Steer run, a branch of the left-hand fork of Steer creek; and when, in 1865, he sold the same tract to E. G. Norman, it seems that he easily found it, because several of the witnesses state, that at the time, when their depositions were taken E. G. Norman was occupying the tract formerly occupied by J. J. Norman.

In the case of *Creigh's Adm'r v. Boggs*, 19 W. Va. 240, this Court held: "Either party to a written contract for the sale of land may have the same specifically enforced in a court of equity with such corrections in it, as parol proof may show to be necessary to correct a mistake made in reducing the contract to writing;" also "When the mistake was made, not in reducing the contract to writing, but in the supposition of both parties that the boundaries of the land named in the contract would include a certain mill-site, and, on discovering that it did not, the parties agree by parol to so change the boundaries as to include the mill-site, and under their direction the surveyor makes a plat and report of the land according to these boundaries, and the vendor brings a suit to enforce the contract with this alteration, and the defendant in his answer admits this mistake of the parties and its correction, producing the

corrected boundaries and plat, but resists the execution of the contract, relying on the statute of frauds, the court will nevertheless specifically enforce such written contract as modified by the parties to correct such mistake."

Instead of changing and altering the boundaries by parol as in the last-named case the parties to the agreement in this case actually ran off and surveyed the entire boundary, and the vendee by parol accepted the entire boundary as surveyed and designated by the vendor acting by his agent and was given a plat of the same, which the evidence of Levi Boggs shows was in the hands of said Norman's widow, which plat showed, that the survey contained 149 acres. It seems to me, that, if a contract in writing in reference to boundaries may be modified and changed by parol, where the written contract provides for the shape of the tract and its locality, extrinsic evidence may be introduced to show, that the land was surveyed by the vendor on the waters designated in the agreement and in the shape therein provided for, and was accepted by the vendee.

Upon the hearing of the cause the court below being of opinion, that proof of the declarations of J. J. Norman in his lifetime as to the location, lines and corners of the tract of land claimed by the plaintiffs could not be received and read to identify said tract of land, and that there was not sufficient proof of the location and identity thereof on the part of the plaintiffs, dismissed the bill, amended bill and bill of revivor with costs. But the evidence of said J. J. Norman was immaterial in support of his claim, as there was other evidence sufficient to identify said 150 acre tract of land. In the case of *Westfall v. Cottrills*, 24 W. Va. 763, which was a suit for specific performance, in which there was a parol contract for the sale of land, in which Cottrills agreed to convey to the plaintiff forty acres of land out of a tract of about 147 acres, which he then owned in said county, situate on Beech Fork, the said forty acres to be run off from the Spring Fork end of said 147 acre tract, that being the upper end thereof, this Court denied specific performance, holding that "in a suit for the specific execution of a parol contract for the purchase of land, where neither the contract nor proof identifies or defines the tract or bound-

aries of the land, nor refers to anything by which it may be identified with reasonable certainty, the Court will dismiss the bill." That was a very different case from the one under consideration. There was no proof in that case of the identity and locality of the land ; here the proof is full showing that the vendor through his agent marked and designated the land.

The defendant, Bennett, in his answer to the amended bill admits, that the title-bond bearing date on the 18th day of September, 1848, was treated as ratified, but alleges, that the 150 acres therein described was part of 300 acres, which was sold to J. J. Norman under a decree of the Circuit Court. In this Bennett is clearly mistaken, as is shown by reference to the title-bond filed as Exhibit 1 with plaintiff's amended bill, which mentions no other land than the 150 acre tract, which appears to have been sold without reference to any other tract, for the consideration of one dollar per acre, while the decree directing the sale of the 300 acre tract on the 31st day of May, 1866, discloses the fact, that the purchase-money then amounted to \$529.89, with a considerable amount of interest to be added. Bennett, having admitted in his answer, that he ratified said agreement made by his attorney in fact, Thomas Marshall, and having received nearly all of the purchase-money, after the boundary lines of said tract had been surveyed and marked, and after Norman had been in possession of the same for about four years, and having allowed Norman to remain in possession, cultivate and improve said lands until his death, in 1865, a period of about seventeen years, and during all that time having asserted no claim to said land, and immediately after the death of J. J. Norman, to wit, on the 17th day of September, 1866, having conveyed said land to E. G. Norman, and this suit having been instituted and the bill filed at June rules, 1875, not quite nine years after said deed was made to E. G. Norman, the plea of the statute of limitations relied on by the defendants can not avail them.

I am therefore of opinion, that the agreement entered into by J. M. Bennett, evidenced by the title-bond bearing date on the 18th day of September, 1848, under which said J. J. Norman took possession of the land, paid a large part of the

purchase-money, and occupied it and claimed it as his own during his whole life, should be specifically enforced; and it appearing, that E. G. Norman took a conveyance from said J. M. Bennett on the 17th day of September, 1866, for 187 acres, 1 rood, and 25 poles of land, which conveyance included the 150 acre tract sold to James J. Norman, with full notice of the possession, right and claims of James J. Norman's estate thereto, said conveyance to said Elijah G. Norman should be set aside as to said 150 acre tract included within the boundaries of said 187 acres, 1 rood, and 25 poles; and upon the payment of the residue of the purchase-money remaining unpaid upon said 150 acre tract, with its accrued interest by the heirs at law of James J. Norman a deed should be directed to be made to them for said 150 acre tract of land.

The decree of the Circuit Court below dismissing the plaintiff's bill, amended bill and bill of revivor must be reversed, and this cause is remanded to the Circuit Court of Gilmer county for further proceedings to be had therein, and the costs of this appeal must be paid by the appellees.

REVERSED. REMANDED

WHEELING.

CHENOWITH v. COUNTY COURT.

Submitted June 14, 1889.—Decided June 28, 1889.

1. CONTRACT—BURDEN OF PROOF.

Where a county court made a contract for the construction of a bridge in accordance with certain specifications attached to and made part of the contract, in a suit by the contractors to recover a balance claimed to be due them on said contract, after the work was completed and received by the county, as they claim, the plaintiff, must show affirmatively, that they have complied with said contract and specifications, or that said work has been received, before they will be entitled to recover.

2. CONTRACT—EVIDENCE.

If the plaintiffs themselves offer in evidence an order of the county court, which shows, that the county court acting upon

the report of the committee appointed to superintend the building of said bridge, which stated that it would take all, that remained unpaid, to make good certain deficiencies in said work; and shows on its face, that said court declines to receive and pay for said work, said order is competent evidence upon the question as to whether said work had been received by the county or not. Following *Kinsley v. Monongalia Co.* 31 W. Va. 464 (7 S. E. Rep. 445.)

3. REVERSAL OF DECREE &C.—BILL OF EXCEPTIONS.

When a bill of exceptions contains a certificate of all the testimony offered, instead of all the facts proved, the court can not reverse the judgment of the court below for refusal to set the verdict aside as contrary to evidence, unless by rejecting all the conflicting evidence of the exceptor, and giving full force and credit to that of the adverse party, the decision of the court below is plainly wrong.

O. Johnson and *H. Peck* for plaintiff in error.

R. S. Blair and *H. C. Showalter* for defendants in error.

ENGLISH, JUDGE:

This was an action of *assumpsit* brought in the Circuit Court of Ritchie county by Eli Chenowith and O. S. Fought, who sued for the use and benefit of W. H. Thomas and O. S. Fought, against the county of Ritchie to recover a balance of \$798.15 alleged to have been due on the 29th day of August, 1884, upon a contract entered into between A. C. Barnard as president of the County Court of Ritchie county and said Eli Chenowith and O. S. Fought for the construction of a bridge across the North Fork of Hughes river near the house of E. R. Taylor, to be completed on the 1st of October, 1884, in accordance with specifications accompanying and referred to in said agreement.

This case seems to have been twice before a jury in the county of Ritchie, and, they failing to agree for cause shown to the court, it was transferred to the county of Doddridge, in which county a trial was had, which terminated on the 1st day of December, 1888, in a verdict for the plaintiffs for the sum of \$1,002.30, with interest thereon from that date, and judgment was rendered against the defendant for that amount in said court. The defendant by its counsel moved to set aside the verdict of the jury, and grant it a new trial, which

motion was overruled; to which action of the court the defendant excepted and prayed, that the evidence given in the cause might be certified and saved to it as a part of the record, and that certain exceptions taken by the defendant to rulings of the court might be saved to it as part of the record in the cause, which was accordingly done, and from said judgment and rulings of said court the defendant applied for and obtained a writ of error to this court.

The first exception relied upon by the defendant, as constituting error in the ruling of the court upon said trial, was in allowing copies of said contract and specifications to be given in evidence to the jury. In the second volume of Greenleaf on Evidence, p. 9, § 11, the author says: "A further preliminary observation may here be made applicable to every action founded on a written document, namely, that the first step in the evidence on the side of the plaintiff is the production of the document itself." But our statute (Code, c. 120, § 5) seems to have changed the common-law by providing: "A copy of any record or paper in the clerk's office of any court, * * * attested by the officer in whose office the same is, may be admitted as evidence in lieu of the original," *etc.* I think therefore the court committed no error in admitting copies of said contract and specifications to be read as evidence before the jury, especially when the order of the County Court awarding the contract to construct said bridge to Chenowith and Fought, and accepting their bond for the performance of the same, directed that said bond and contract be filed in the office of the clerk of said County Court, and being so filed the clerk was authorized to make a certified copy of the same, and said certified copy was doubtless the best evidence the plaintiff could produce of said contract.

The second error relied upon by the plaintiff in error is, that the court erred in admitting an order of the County Court of Ritchie county appointing E. J. Taylor, E. R. Taylor, and James M. Wilson a committee to advertise for sealed bids for an iron bridge or wooden arch bridge to be erected across the North Fork of Hughes river near the residence of E. R. Taylor, prescribing the time that notice should be given, and requiring said committee to report their

proceedings to the court, when the court would decide the character of the bridge to be built. We find, however, by reference to the case of *Kinsley v. Monongalia Co.*, 31 W. Va. 454, (7 S. E. Rep. 445)—which was a similar case to the one under consideration, that Kinsley having brought an action of *assumpsit* against said county to recover for his services rendered in constructing a bridge,—this court in delivering its opinion says: "It is also insisted that the court erred in refusing to admit in evidence an order of the County Court. A number of orders were properly admitted, such as the order appointing viewers; the order appointing commissioners to contract for the work; the order requiring certain money to be paid to the contractor," etc. The order, to which said second exception refers, was an order appointing a committee to advertise for sealed proposals, and we think it is almost identical with the order, which was held to be properly admitted in said last-named case, that it is a link in the plaintiff's evidence, which is necessary in order to make out his case, and can not be regarded as irrelevant, and the said objection was properly overruled.

The next point relied on by the plaintiff in error is, that the court erred in sustaining the objection made by plaintiff's counsel to the question asked the witness, A. C. Barnard, who appears to have been a member of the County Court of Ritchie county, when said bridge was being constructed. The question objected to was as follows: "Did the County Court at any time accept that bridge or any part of it and take it off the contractor's hands?" We think the court erred in sustaining said objection. It is true to some extent, that a court can only speak by its record, but A. C. Barnard although one of the members of the court and a component part thereof when sitting as a court, was not the court nor any part of it, when said court was not in session and acting as a court; and when he was asked to state a fact, which might well be supposed to be within his knowledge, to wit, whether the County Court did at any time accept said bridge or any part of it, it seems to us, he might state the fact affirmatively or negatively without going to the order-book, and reading the orders made indicating the acceptance or rejection of said bridge. It does not seem

to us, that the question is objectionable, on the ground that it is leading or irrelevant; it does not suggest the answer expected, and leaves him free to answer it as he chooses. The witness should have been allowed to answer the question.

The fourth assignment of error is as to the action of the court in refusing to allow the witness E. R. Taylor to answer the following questions, to wit: "Was it or not this digging that caused the wing walls to fall down?" and, "What caused the wing wall to fall?" also: "Were the committee and the contractor upon the bridge-site, about the time the contract was entered into, for the purpose of ascertaining upon what the abutment would rest?" And when the witness answered, "Yes, sir; they ascertained upon what it should rest;" he was asked, "Upon what" and the court refused to allow him to answer. It will be remembered, that the plaintiff had already introduced and read in evidence the contract and specifications for the erection and construction of said bridge. These papers clearly show, that said abutments were to rest upon the solid rock, and the relevancy of the questions is apparent, when it is considered, that the committee and contractors went upon the site to ascertain, whether it was possible or practicable to place the said abutments upon a solid foundation; and after making the examination the contract was drawn providing, that said abutments should set on solid rock base. This evidence tends to show, that the contractors did not enter into said agreement unadvisedly, but after examining the location with the committee, and it is not to be presumed, that they would have contracted to place the abutments on a solid rock base, if they had not ascertained that the rock was there. As to the other questions, he should have been permitted to answer the question, "What caused that wing to fall?" because his answer to that question may have disclosed the character of the foundation, upon which said wing wall rested, and may have shown, that its fall was not occasioned by digging the dirt away from it.

The next exception relied on by the plaintiff in error is to the action of the court in overruling its objection to a question asked the witness, O. S. Fought, "as to the present

condition of the abutment." It seems to us, that this question was relevant, and that the witness should have been allowed to answer; for the reason that the answer would tend to throw light upon the original character of the work, demonstrate its weak points or show whether it was in conformity with the contract in such respects, as would insure its durability.

The sixth assignment of error claims, that the court erred in refusing to allow the witness, John P. Wildman, to testify in rebuttal. This witness was introduced as an expert stonemason, who stated that he had worked at the business since 1857 or 1858, and was introduced by way of rebuttal to the evidence of O'Kelly, Hart and Hibbs, who, after the plaintiffs had rested, were allowed to speak of the present condition of the abutment, after the court had allowed both parties to introduce such evidence; and when said witness had stated, that he had worked on pitch and range work and all kinds of work, arching tunnels, building abutments for bridges, and on house-work, and that he saw this abutment in February, 1885, and when he was asked to state what character of work that was,—the question was objected to by plaintiffs' counsel, and the court sustained the objection. This ruling of the court, it seems to us, was erroneous, as other witnesses had been allowed to testify as experts for plaintiffs in regard to the character of the work,—the witness Wildman should also have been allowed to testify in regard to the same matter by way of rebuttal.

Coming to the seventh and last assignment of error to wit, "in refusing to set aside the verdict of the jury and grant the defendant a new trial, because the same was contrary to the law and evidence," we first look to the bill of exceptions, which was made a part of the record at the time of the trial, and find that in the conclusion the court certified, that the foregoing was all the testimony offered in the cause instead of certifying the facts proved. When a certificate of this character is made, this Court has repeatedly held, "that it can not reverse the judgment of the court below for refusal to set aside the verdict as contrary to evidence, unless, by rejecting all the parol evidence for the exceptor, and giving full force and credit to that of the adverse party, the

decision of the court below still appears to be wrong." See *Sanaker v. Cushwa, Adm'r*, 3 W. Va. 29; *Sheff v. City of Huntington*, 16 W. Va. 308; *Black v. Thomas*, 21 W. Va. 709.

Acting upon this well-settled practice, and rejecting the parol evidence offered by the defendant, the question presented for consideration is: Have the plaintiffs shown themselves entitled to recover in said action. It is incumbent on them to show affirmatively, not only what the contract was, but also that they have complied with it. By reference to the bill of exceptions it will be perceived, that they offered in evidence the contract including the specifications thereto attached and which were part thereof; and in that contract they agreed "to build said bridge and abutments in accordance with the plans and specifications thereto attached and at the price therein named;" and it was further agreed "that all of the above-named work should be done in a neat, substantial and workman-like manner, said abutments to be nineteen feet high, set on solid rock base." It seems that Eli Chenowith, one of the contractors, assigned his portion of the contract to one W. H. Thomas, who is one of the plaintiffs in this action. O. S. Fought, one of the contractors, had himself sworn as a witness, and stated, that he built the bridge, just as he understood the contract and specifications, and he states twice, that, when they finished the stone-work, the committee composed of Taylor, Brown, and Gray received it and paid them for it; but he nowhere states, that said abutments were constructed so as to be nineteen feet high; that the work was done in a neat, substantial and workman-like-manner; or that said abutments were set on solid rock base.

It will be seen that the plaintiffs in said suit contracted for said stone-work and wood-work as an entirety and not separately. Their contract was to build the bridge in accordance with the specifications, and, although they were to be paid as the work progressed, the work was not to be received until the bridge was finished. The contract for the stone-work was not a separate contract from the wood-work, and the order of the County Court of Ritchie, dated the 17th of July, 1884, which was given in evidence by said

Fought shows, that said County Court, upon the report of Brown and Taylor, two of said committee, declined to pay the balance of \$798.65, which plaintiffs claimed was yet due on said bridge; their report setting forth, that it would probably take said balance to make good certain deficiencies therein mentioned, showing that said committee were clearly of opinion, that plaintiffs had failed to comply with their contract in constructing said bridge.

W. H. Thomas, one of the plaintiffs, was also sworn as a witness, and said, he saw Gray, Fought and E. R. Taylor measuring the abutment; that he bought Chenowith's interest in the bridge, and completed the wood-work according to the contract; that the committee saw it, and made no objection to it; that Brown, one of the committee, said it was a very good job, if they would tighten up some of the bolts and washers; that Taylor told the court, it was a good job of work, and ought to be protected; that he (witness) requested the court to make an order for shingles to cover the bridge, or finish covering it, which the court declined to do, and he afterwards bought shingles himself to finish covering it, and then sent for the committee to come and receive it, and after they came he told them if they had any suggestions to make about anything he was ready to do it, and they made no suggestions about anything but the bolts, and he went home and paid no more attention to it; that he became a contractor after the stone-work was completed, *etc.* It will be seen, that his testimony has reference mainly to the wood-work. He further says that E. J. Taylor said to him, when he was beginning the bridge, (evidently meaning the wood-work,) "Hadn't you better wait until we investigate this thing a little?" (meaning the abutment); that that was all the notice he ever had; that he saw some places in the abutment under the ground, which might have been better; that the committee called him to see the abutment about the time they were beginning to raise the bridge; that he jobbed a crowbar down, and felt something—a log or a rock; that he at last became alarmed at the reports about the deficiencies in the abutment, and went to E. J. Taylor and told him about these reports that were being circulated, and that Taylor said they were all lies started by old Chenowith and Granville

Cottrill, and that nobody would believe them on oath, and for witness to go back and finish the work, learn all he could about bridge-building, and that he (Taylor) and witness would take the job of building another bridge across South Fork; that neither Taylor nor Chenowith told him the abutment was defective; that there were no cracks in the face of the abutment; that some of the joints did not fit up; that he could slip his fingers in where the mortar had fallen out; that he saw solid rock under the abutment three feet; that he saw Mr. Porter digging a hole under the abutment; that he and Mr. Britton leveled from the rock in the bed of the river, and it was only three inches lower than the bottom of the abutment; that he does not know whether the abutment is in solid base rock or not; that he would not state anything more about it; that it could not stand there in the condition it is in, if it were not on the solid rock base; too much weight there.

A. B. Wilson, a witness called by plaintiff, stated, that he was employed by the County Court to build an approach to said bridge in the fall of 1884, and received \$240.00 for it in orders, which he filed with his deposition, that he was employed by Mr. Barnard, president of the County Court, and J. M. Wilson, to make the approach, and he believes he saw two men ride over it,—a Mr. Taylor and Mr. Wilson.

This was all the evidence offered by the plaintiffs in chief. They (the plaintiffs) called several witnesses by way of rebuttal, one of whom, an expert by the name of Jacob Hibbs, stated on cross-examination, that he did not consider the work done in a workman-like manner; that ten or twelve feet of the wing-wall fell down; that it would be hard for him to tell, whether it would have fallen anyhow, or the excavation caused it to fall, *etc.* He had before stated that he had been a stone-mason for forty five years, *etc.*

This is the case presented by the plaintiff's evidence, and, excluding all evidence offered by the defendant, whether contradicted or not, it does not seem to me, that it would entitle the plaintiffs to the verdict rendered. It nowhere appears, that the abutment was built upon a solid rock foundation as the contract requires. On the contrary, the plaintiff Thomas says, he does not know whether the abutment is on solid base

rock or not. He saw Mr. Porter digging a hole under the abutment, which he could not have done if it stood upon a solid rock foundation; and Mr. Hibbs states, that it was a rough job and not done in a workman-like manner; and the orders of the County Court offered in evidence by the plaintiffs show clearly, that the committee's report was adverse to the reception of the bridge, and for that reason the court declined to pay for the same. Without, then, invading the province of the jury in weighing the testimony *pro* and *con*, but considering only the evidence offered by the plaintiffs in connection with the errors we have hereinbefore indicated in the rulings of the court, I am of opinion, that the judgment of the court must be reversed, a new trial awarded. The cause is remanded to the Circuit Court of Doddridge county for that purpose, and the plaintiff in error must recover the costs of this writ of error.

REVERSED. REMANDED.

WHEELING.

FLEMING v. COMMISSIONERS.

Submitted June 17, 1889.—Decided June 28, 1889.

CERTIORARI.

A petition for a writ of *certiorari* to bring to the Circuit Court for review proceedings of the commissioners of a County Court in the canvass of the returns of an election filed by a candidate, which fails to show, that he was prejudiced by the errors complained of, is not sufficient to justify the award of such writ, and will be held bad without demurrer at the hearing; and a judgment of a Circuit Court reversing the action of the commissioners upon a *certiorari* based on such petition will be reversed here with costs in this Court against the party who filed such petition.

J. W. St. Clair, Brown & Jackson and *O. Johnson* for plaintiff in error.

A. Burlew, J. A. Hutchinson and *W. P. Hubbard* for defendants in error.

BRANNON, JUDGE:

A. B. Fleming filed a petition in the Circuit Court of Kanawha county alleging, that at the election, November 6, 1888, he was a candidate for governor and received a large number of votes in every county in the State, and that Nathan Goff was candidate also and received a large number of votes in every county in the State; that it appeared from the returns of the election, as certified by the commissioners of the County Courts of the several counties, that for said office said Fleming received _____ votes, and said Goff _____ votes, and that the total number received by all other candidates did not exceed 10,000 for said office; that the vote for said Fleming and Goff respectively, as shown on the poll-books of the different precincts in Kanawha county, was as follows: For said Fleming _____ votes, and for said Goff _____ votes; that when the commissioners met on the 12th of November, 1888, to ascertain the result in the county of Kanawha, said Fleming demanded a re-count of the ballots, which was made, and its result was as follows: For said Fleming _____ votes, for said Goff _____ votes; that the commissioners refused to accept the result of the re-count, but declared and decided, that in ascertaining the result they would accept the result of the re-count of all the precincts except five, which were named, and as to three of those they would accept the returns as originally certified and reject all the ballots cast at two of them, and they ascertained the result accordingly,—that is, for said Fleming _____ votes, for said Goff _____ votes. The petition further alleged, that at each of the five precincts, where the result on the re-count was rejected, the vote on the original return was for Fleming _____ votes, for Goff _____ votes, and on the re-count for Fleming _____ votes, for Goff _____ votes, not giving the vote at any precinct either on the original return or on the re-count. It alleged divers errors on the part of the commissioners in refusing Fleming leave to cross-examine witnesses, or to introduce witnesses as to the conduct of the election. It alleged, that said Fleming moved the commissioners to ascertain the result by the re-count except at two of those five precincts, and to reject them entirely, which they refused to do; and

that Fleming moved, that, if those two precincts be counted, they be counted according to the re-count, but they refused to do so; that he moved then to adopt the re-count at three of these precincts, which they refused; that said Fleming excepted to these rulings and actions, and that the commissioners made a record of their proceedings and signed a bill of exceptions. The petition alleged, that said Fleming was aggrieved by the errors and arbitrary and erroneous rulings of said commissioners and prayed a writ of *certiorari* to correct such errors and do justice to him in the matter.

A writ of *certiorari* was awarded, and on the 8th of April, 1889, the Circuit Court entered a judgment reversing the decisions and determinations complained of in said petition. Fleming then moved the court to retain the cause for further proceedings; but the court refused to do so. The judgment further directed the commissioners to again meet and perform the duty of canvassing the returns for governor, directing them to allow cross-examination of witnesses and to introduce evidence.

Fleming took this writ of error and assigns as error, that the Circuit Court of Kanawha did not retain and hear and determine the cause, but remanded the cause to an inferior tribunal, which was *functus officio*. The record before us contains no such bill of exceptions or commissioners' record, as the petition asserts to have been made.

The matters sought to be presented in this case are similar in nature to those involved in the case of *Alderson v. Commissioners*, *supra*, p. 454 (9 S. E. Rep. 863) and, if the petition and record were not so defective, the principles announced in the opinion, and the judgment rendered in that case, would apply in this cause. The petition, on which the *certiorari* was awarded, is so defective, that no writ of *certiorari* or judgment thereon could properly have been awarded or rendered. A pleading must show, that the party has a right, and that such right has been violated so as to call for redress. It must show a cause of action. It must show, just what right the plaintiff has, and just how and wherein it has been violated. A petition for a writ of *certiorari* must show a right in the petitioner, and that he is injured by the action complained of, and wherein

the inferior tribunal has erred to the prejudice of that right. It will not be enough to say generally a party has been aggrieved. The petition must state how, wherein. This petition does not state, that petitioner received any particular number of votes, or that Goff received any particular number of votes in State, county of Kanawha or any precinct therein, or that petitioner's election was defeated or prejudiced by the erroneous action; nor does it state, how many votes the petitioner or other candidates received by the original returns or the re-count in Kanawha county or in any single precinct in it, nor whether he was injured by the adoption of the result on the re-count at those precincts, where that result was adopted, or by the adoption of the original returns from those precincts, where such returns were adopted, or by rejecting or excluding precincts, the vote of which was rejected or excluded. Probably no attention was called to this defect in the Circuit Court, but it is here cross-assigned as error by the defence. We must for this cause reverse and remand the case to the Circuit Court, with leave to plaintiff to amend his petition within a reasonable time, and, if not so amended, the Circuit Court must dismiss it; and as the cause of reversal is the defect of the petition, and is for the fault of plaintiff in error, he must be subjected to the costs in this Court. *Gaylords v. Kelshan*, 1 Wall. 81.

REVERSED—REMANDED.

39	640
39	469
38	611
33	615
33	617
32	640
35	713
32	640
42	415
32	640
45	834
32	640
53	376
32	640
63	640

WHEELING.

ALDERSON v. COMMISSIONERS.

*(GREEN, JUDGE, absent.)

Submitted June 17, 1889.—Decided June 28, 1889.

1. INJUNCTION—JURISDICTION—EQUITY—ELECTIONS.

Equity has no jurisdiction to enjoin commissioners of a County Court from certifying to the governor the result of their canvass

*On account of illness.

of the vote in their county for a representative in the congress of the United States.

2. INJUNCTION—CONTEMPT.

An appeal from a decree in a suit in equity will not bring up for review an order discharging a rule to show cause why the party shall not be punished for contempt in disobeying an order of injunction made in such suit.

J. W. St. Clair, Brown & Jackson and O. Johnson for appellant.

A. Burlew and J. A. Hutchinson for appellees.

BRANNON, JUDGE :

John D. Alderson presented to the judge of the eighth circuit a bill in equity stating in effect, that at the election in this state on November 6, 1888, he received a large number of votes for representative in the Congress of the United States for the Third district of this state; that the opposing candidate was James H. MacGinnis, who received a large number of votes for the same position; that the result of the election in each county of said district except Kanawha had been certified to the governor; that either he or MacGinnis had been elected; that the result depended on the ascertainment of the result in Kanawha county; that the defendant commissioners on November 12th met to ascertain the result in said county; that returns as certified from the precincts showed, that said Alderson had received 3,329 and said MacGinnis 4,658 votes; that said Alderson demanded a re-count, which re-count was made, whereby the result was for said Alderson 3,341 and for said MacGinnis 4,688 votes; that said commissioners refused to accept such re-count except as to certain precincts, and as to others adopted the original returns, rejecting the result of the re-count there, and entirely rejected the votes cast at two precincts, whereby the result was for said Alderson 3,325 and for said MacGinnis 4,660 votes, which would elect said MacGinnis. The bill states, that the said Alderson excepted to this action of the commissioners and during the progress of the canvass excepted to various rulings and decisions of the commissioners, which are detailed in the bill. The bill also states, that the commissioners refused to settle and sign

bills of exceptions touching these rulings, and that said Alderson by a proceeding in *mandamus* in this Court obtained a mandate from this Court requiring them to do so; and that they were bound to make a record of all poll-books, ballots, packages, ballot-boxes, and tally-sheets, tally-sheets on the recount and evidence, and their rulings and actions; and that he had tendered them a bill of exceptions representing the same, but they had not yet settled and signed it; and that, as soon as settled and signed, he would apply to the Circuit Court of Kanawha for a writ of *certiorari* to correct such erroneous proceedings of said commissioners; that, in order that justice might be done, it was important to him, that said commissioners should not send to the governor certificates of the result of said election in said county according to their said decision; that it was the intention of the commissioners, as soon as they should sign said bill of exceptions and before he could have time to apply to said Circuit Court and obtain a *certiorari* and give bond, to certify said result to the governor according to their erroneous decision, and that they intended so doing for the very purpose of defeating said Alderson's right to review said proceedings; that he had asked said commissioners to consent not to certify said result, until he could apply for the *certiorari*, but they declined to say what their intention was; that though they had announced their decision, they were keeping it off the record, until the bill of exceptions should be signed, and he charged that they had already made out a certificate ready to file with the governor, as soon as the exception should be signed, and their decision entered of record, and that they had prepared it, that there might be as little delay as possible in filing it with the governor, and that thereby the said Alderson would be defeated in his attempt to review said proceedings. He prayed an injunction to restrain the commissioners from certifying to the governor the result of said election. On December 15, 1888, such injunction was awarded. Said Alderson on January 4, 1889, filed in court his affidavit stating, that process upon the injunction-bill was served on two of the commissioners December 15th, but does not give date of service on the other; that on December 15, 1888, he presented his petition for a *certiorari* to re-

view such proceedings, and it appears it was allowed 17th December, 1888, with an order restraining them from certifying said result, and that he believes the said commissioners had full notice thereof; and that notwithstanding such notice and service of process on said injunction said commissioners did certify such result to the governor; and on said Alderson's motion a rule was awarded against them to show cause, why they should not be punished for their contempt in so violating the injunction. Afterwards the defendants moved the court to quash the said rule for contempt as improvidently awarded and for want of jurisdiction, and the rule was quashed, and defendants discharged therefrom. Afterwards the defendants moved the court to dissolve the injunction, and the same was dissolved for want of jurisdiction, and the bill dismissed.

Said Alderson appealed to this Court. He assigns that the court erred in dissolving the injunction and dismissing the bill, and in discharging the rule for contempt.

The defendants contend, that there was no jurisdiction in the Circuit Court to entertain the injunction, and that it properly dissolved it and dismissed the bill. No principle of the law of injunction is better settled, than that injunction does not lie to determine questions of appointment to public office and the title thereto, as they are of purely legal nature and cognizable only in courts of law. 2 High, Inj. § 1312; High, Extr. Rem. § 619; *Kilpatrick v. Smith*, 77 Va. 347; Judge GREEN's opinion and authorities cited in *Dryden v. Swinburn*, 15 W. Va. 234. This is not, however, a proceeding to try title to an office, but to restrain county commissioners from sending to the governor the result of their count of the votes for a representative in the United States Congress. Does an injunction lie in such case?

Our statute provides, that the commissioners shall ascertain the result of the election in their county and certify it to the governor, who is to ascertain, who is elected, and make proclamation thereof. In *Dickey v. Reed*, 78 Ill. 261, it was held, that a court of chancery has no power to restrain by injunction a board of canvassers from canvassing the returns of an election, where the law, under which the election was held, neither in terms nor by implication confers such power,

and where there are no facts before the court, which require it to take judicial cognizance and hear and adjudicate and decree; and that, valuable as is the remedy in its proper sphere, it must not be extended to doubtful cases, or to accomplish ends, where there are other adequate remedies. The opinion in that case is elaborate and well sustained. I quote some of its passages:

"If the court may exercise this jurisdiction in cases of doubt, or even where there is no doubt, of the result, a few * * * persons might, and probably would, be induced, from the heat and strife always engendered in such elections, to resort to a bill and injunction, and thus for years thwart the will of the people. * * * Public policy does not require such a jurisdiction, even if it could sanction it. If the power were admitted, where would its jurisdiction end? * * * Sanction the power in this case as inherent in the court of chancery, could any ingenuity suggest reasons which should forbid the application of the same rule to every case we have above supposed, or any election case where fraud is alleged? In this case alleged fraud is the ground on which the power is urged. So would it be in those cases, and the fraud would be precisely the same in each."

In *Peck v. Weddell*, 17 Ohio St., 271, it was held that fraud in election could not justify injunction. In *Thompson v. Ewing*, 1 Brewst. 67, it is held, that equity can not restrain a prothonotary from certifying election-returns to the board of return judges, though the returns are admitted to be forgeries. 6 Amer. & Eng. Cylop. Law, tit. "Elections," p. 890, states the law thus: "A court of equity will not interfere by an injunction to prevent the election officers or canvassing officers from doing their duty as required by the law, nor prevent them from canvassing votes in a certain way."

I think the case of *Fleming v. Guthrie*, *supra* p. —(9 S. E. Rep. 23) contains principles of law kindred to if not binding as authority in this case. Judge Fleming, who was a candidate for governor at the same election, obtained an injunction restraining the secretary of state from laying before the legislature the certificate of the commissioners of the County Court of Kanawha county of the result of the election as

to governor, and afterwards Gen. Goff, who was also a candidate for governor, obtained from the Circuit Court of Kanawha a *mandamus* to compel the secretary of state to do what he had been so enjoined from doing. The Circuit Court announced, that it would disregard and ignore such injunction. The bill of injunction alleged that Fleming had before that obtained from said circuit court a *certiorari* to correct the action of the commissioners in canvassing the vote for governor, and that said *certiorari* was yet pending, but that said commissioners had transmitted said certificate of returns to secretary of state before said *certiorari* issued. Fleming asked a writ of prohibition from this Court to prohibit the circuit court from ignoring said injunction and proceeding with said *mandamus*, which was refused by this Court.

Here was an injunction to restrain the sending to the legislature, that it might declare the result as to governor, the returns of Kanawha county, until the pending writ of *certiorari* should accomplish correction of alleged errors and procure correct returns. That injunction might be said to be merely auxiliary and necessary to keep back the returns, so that they could not be made the basis of a declaration of election, until correct returns should be had, just as much as in this case; but the court did not think the injunction could be sustained for want of jurisdiction. In delivering the opinion of the court, SNYDER, president of the court, said :

“In *Walton v. Develing*, 61 Ill. 201, it was held that ‘where the law plainly requires an officer to perform a duty, and he is not exceeding or abusing his powers, but fairly acting within the same, and a court issues a writ to restrain him from its performance, he must discharge his duty as prescribed by the law.’ That case was a proceeding for contempt against election officers for holding an election in obedience to an order of injunction, and in which the court held that the injunction, having been issued without authority, was void, and that there was no contempt in disobeying it. The court, in its opinion, says: ‘In such case what must control the officer,—the mandate of the county or the plain behests of the law? The court, as well as the inferior officer, must be governed by the law. When the law imposes a positive duty upon a public functionary, and a court commands him not to

perform it, he must obey the law, and disobey the writ of the court.' In *Moulton v. Reid*, 54 Ala. 320, it was decided that a court of equity has no jurisdiction to enjoin the person declared elected to a municipal office from using his certificate of election where the law provides for a contest."

This Court then held: "A court of equity has no jurisdiction to enjoin the Secretary of State from delivering to the speaker of the house of delegates the sealed returns of an election for governor properly transmitted to him, and such injunction, if granted, will be treated as a nullity." And citing in its opinion with approbation the case of *Smith v. Myers*, 109 Ind. 1 (9 N. E. Rep. 692) quoted from it as follows: "It is a principle of constitutional law, declared in our constitution, and enforced by many decisions of our own and other courts, that the departments of government are separate and distinct, and that the officers of one department shall not invade any other. To interfere by injunction in this case would involve a violation of this fundamental principle, as a conflict between two great departments of the government would result from an exercise of the jurisdiction invoked by the appellant."

Why do not these principles substantially apply to the case in hand? The injunction here involved was an act of the judicial department tending in its consequences to prevent the governor, the chief of the executive department, from performing an important function assigned to him by law,—that of declaring an election of a member of Congress. Through these commissioners the popular will in elections for all offices, national and state, from president and governor down as expressed in the several counties, is ascertained and certified to the power, which declares the election-result. For representative in Congress the vote is certified by them to the highest State officer, the Governor, in order that he may ascertain and declare the result. This duty is of the most vital importance and should be performed without delay.

Is it possible, that injunction lies to tie up even temporarily the performance of these functions so necessary to reach the popular verdict, when any candidate may think himself aggrieved, and make it dependent on private litigation? Do not the evils of the exercise of such a jurisdiction at once suggest themselves without specification? Once the

courts allow it, where will it end? How often and where will it be exercised? It may be rather asked, when and where will it not be exercised? It would prove a Pandora's box, the evils and ultimate effects of which can not be readily foreseen. Through the exercise of such a power in the courts by injunction that which is most sacred in free government—the will of the voters—may be indefinitely delayed in its expression or practically defeated. These matters are in their nature political, and their decision rests with the political power of the government, and the processes, which it has designated for the purpose, not with the judiciary; and the courts should be on their guard lest they overstep the legitimate boundary of their jurisdiction.

This Court has, under the clause of the constitution giving Circuit Courts power to supervise and control all proceedings before justices and other inferior tribunals by *mandamus*, prohibition, and *certiorari*, sustained a jurisdiction by those processes and in so doing has gone as far, as there is warrant, and does not desire to extend the scope of the process of injunction into this field. There is no provision in the constitution expressly authorizing it as to injunction.

But it is argued, that this case is an exception to the general rule, and that the injunction in this instance is only auxiliary or ancillary to the proceeding at law by *certiorari*; that but for it the commissioners could and would certify the returns to the governor before the plaintiff could obtain that writ and give bond to consummate it, and thus render the *certiorari* abortive. I do not see, that the mere fact, that a party has taken exceptions in a law proceeding with intention to appeal to a higher court will warrant an injunction to restrain the judgment. Here the exception was not yet settled or signed; no *certiorari* was pending. Perhaps the intention to obtain it might not be carried out, or the writ might not be obtained. But the position, that there was no other remedy does not seem sound. If upon the *certiorari* when obtained the action of the commissioners should be reversed, the judgment might be such as to need no further proceedings before them; or, if such further proceedings should be necessary, they could be required to review their work and properly certify the result of the election, as

this Court has at this term decided in *Alderson v. Commissioners, supra*, p. —; and beyond this the law affords ample and adequate remedy in the process of a contested election. Equity disavows jurisdiction by the stringent process of injunction, where other adequate remedy exists. High, Inj. § 28. Equity especially disavows a jurisdiction in matters pertaining to elections. We fail to see in the circumstances of this case, that stress of necessity, which would make this case an exception to a general rule, which the able and distinguished counsel for the plaintiff frankly admits to exist.

If it be argued, that the contemplated hasty action by the commissioners was with fraudulent intent to defeat the purpose of the *certiorari*, the answer is, first, that the law does not impute fraud to public functionaries in the exercise of their lawful jurisdiction, (*Bridge Co. v. Town of Point Pleasant, supra* p.—(9 S. E. Rep. 231) and further that we do not see how fraud could be imputed to them in doing an act, which the law made it their duty to do.

As to the error alleged in discharging the rule for contempt: Does this appeal bring up the judgment in this proceeding to this court for review? The proceeding for a contempt is a criminal proceeding in its nature, separate and distinct, upon the return of the rule or appearance thereto by the defendant, from the cause, in a violation of orders in which the contempt consists. *Railroad Co. v. Wheeling*, 13 Gratt. 40; *State v. Irwin*, 30 W. Va. 404, (4 S. E. Rep, 413); *Mason v. Bridge Co.* 16 W. Va. 864. It is to be then entitled in the name of the state at the relation of the party complaining against the offender. It was so entitled in this case. It must be entered in the law order-book, though the contempt was in disobedience of process or orders in chancery, and it is error to fail to enter it in the law order-book. *Ruhl v. Ruhl*, 24 W. Va. 279. It does not appear in what book the order of discharge was entered in this instance. The petition in this case asked an appeal from and *supersedeas* to the two orders in it specified, made 9th January, 1889; one being the order discharging the rule, the other dissolving the injunction and dismissing the bill.

What are we to call this proceeding, or what are we to consider it? It can not be both an appeal and writ of error.

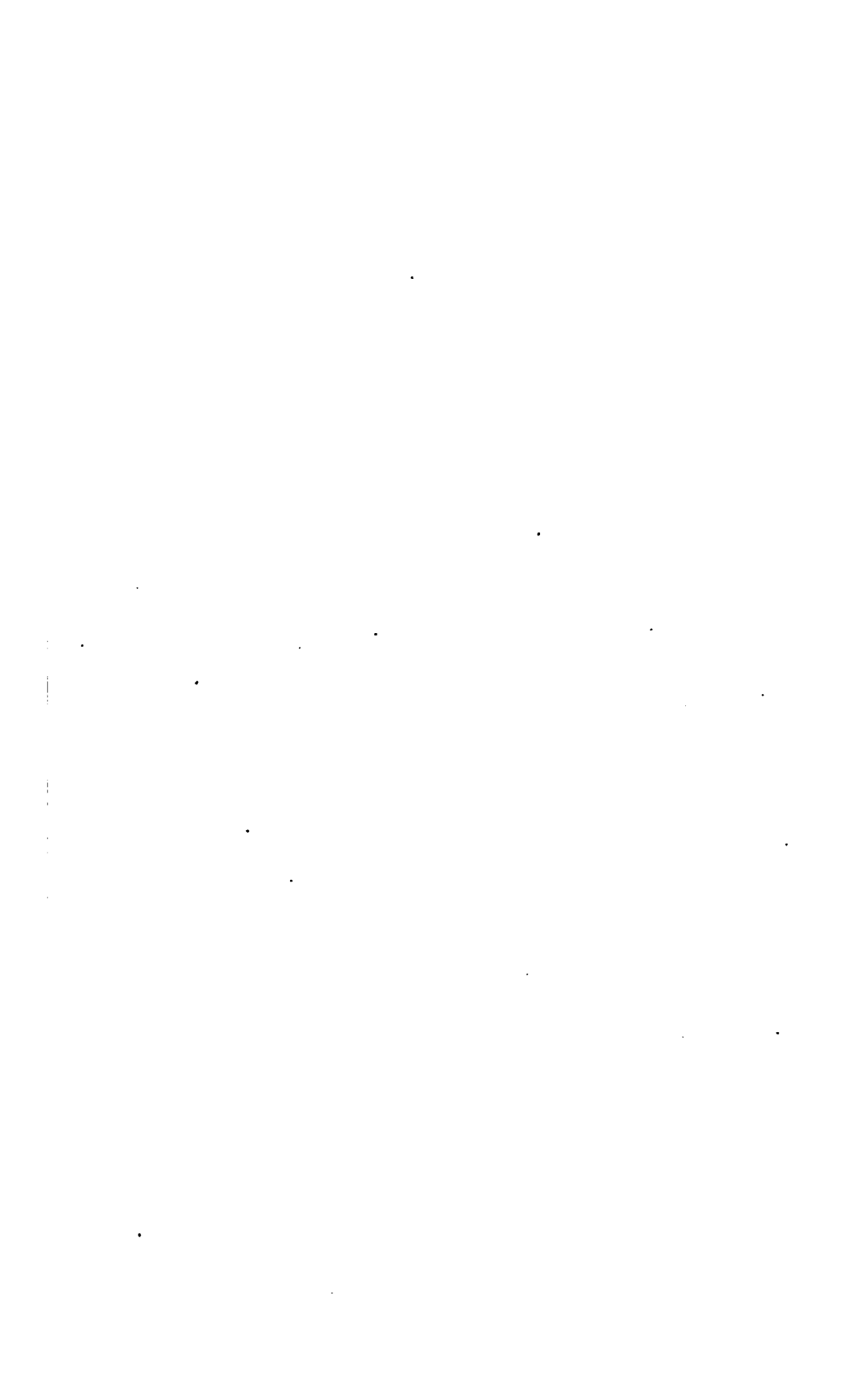
I think it is, what the record calls it, an appeal in said chancery cause, and that, so far as it applies to the order discharging the rule for contempt, it was improvidently allowed, and that it does not bring up for review the order discharging said rule, because that is separate and distinct from the chancery proceeding, criminal in its nature, and can not be brought here by appeal, but only by writ of error. As that order is not therefore reviewable or cognizable in this appeal, we do not consider any question involved in it, whether the said Alderson has such relation to it as to warrant proceedings in his individual name for its review, or whether any contempt was committed.

The decree of the Circuit Court dissolving the injunction and dismissing the bill is affirmed, with costs and \$30.00 damages to appellees.

AFFIRMED.



APPENDIX.



UNITED STATES CIRCUIT COURT
FOR THE DISTRICT OF WEST VIRGINIA.

CHARLESTON.

November, 15, 1889.

*WAKEMAN v. THOMPSON.

Appendix.
32 1
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J. J. JACKSON, JUDGE :

It is alleged in the original and first amended bill in this cause, that the plaintiff was the owner of 60,000 acres of land lying mostly in Boone county, in this state, a part of which is in controversy in this suit : That for the years 1869 and 1870 it was returned delinquent by the sheriff of Boone county for the non-payment of taxes thereon, in the name of the plaintiff; that on the 12th day of October, 1871, it was sold by the sheriff of Boone county for the non-payment of taxes thereon, and was purchased by the state, not being redeemed by the owner within the time prescribed by law; that the land was certified by the then auditor of state "as land within said Boone county forfeited to the state of West Virginia in the name of Burr Wakeman, for the non-payment of the taxes thereon for the years 1869 and 1870;" that afterwards, the defendant, Thompson, commissioner of school lands for Boone county, filed his petition in the Cir-

*This opinion delivered by Hon. J. J. Jackson, Judge of the U. S. District Court, for the District of West Virginia, passes upon questions of interest to the profession in this State and is therefore included in this volume.

cuit Court for that county, to have the said land sold for the benefit of the school fund, and a decree being obtained for that purpose, the commissioner sold a portion of the land and made conveyance to the purchasers thereof.

The bills allege numerous irregularities and illegalities in the proceedings as reasons why the sales and deeds should be declared illegal and void. After the filing of the original and first amended bills the plaintiffs allege, that they discovered other errors, irregularities and illegalities in the proceedings of the sheriff and recorder of Boone county in relation to the sale of the land, and the report thereof to the recorder by the sheriff, and the recordation thereof by the recorder, which would render the proceedings absolutely null and void, and that in fact no forfeiture of said tract of land ever occurred. For this reason the second amended and supplemental bill was filed, setting up these facts. The defendants filed their answer in reply to the allegations of the bill, amended and supplemental bill setting up various defences, amongst others, the sale of the land for the non-payment of taxes under the decree of the Circuit Court of Boone county, relying upon the defence that the Courts of the United States were without jurisdiction to pass upon the validity of the title to the lands claimed herein, for the reason that the deeds having been made in pursuance of an order of the Circuit Court sitting for the county of Boone, where the lands lie, such sales could only be set aside and avoided by the decree of the court which directed them to be made.

In this last position I do not concur. The plaintiffs are citizens of New York, and the defendants being citizens of West Virginia, the controversy between the parties is one between citizens of different states, and therefore, by the constitution and laws of the United States, is one of which the proper court of the United States may take cognizance in some form.

The question to be determined here is, whether the orders of the Boone Circuit Court, under which the lands in dispute were sold, are conclusive and binding upon the plaintiffs, when assailed in an independent collateral proceeding, may be decided as well here as in the state court.

The presence of such a question in the case does not affect the jurisdiction of this Court, for it is competent for the Federal Court in a controversy between citizens of different states to pass upon the question whether the state court had jurisdiction or power to order the lands in question sold by the school commissioner. *Payne v. Hook*, 7th Wallace, 425; *Johnson v. Waters*, 111 U. S., 340; *Arrowsmith v. Gleason*, 129th U. S., 86.

In the last case referred to the court said: "These principles control the present case, which although involving rights arising under judicial proceedings in another jurisdiction, is an original, independent suit for equitable relief between the parties; such relief being grounded upon a new state of facts, disclosing not only imposition upon a court of justice, in procuring from it authority to sell an infant's lands when there was no necessity therefor, but actual fraud in the exercise from time to time of the authority so obtained. As this case is within the equity jurisdiction of the Circuit Court, as defined by the constitution and laws of the United States, that court may, by its decree, lay hold of the parties and compel them to do what, according to the principles of equity they ought to do, thereby securing and establishing the rights of which the plaintiff is alleged to have been deprived by fraud and collusion." Applying the principles announced in the foregoing decisions it will hereafter be seen in the discussion of this case that it falls within the principles as announced by the court in the foregoing cases.

The next contention is that the plaintiffs never having qualified as executors of Burr Wakeman in this state, could not bring this suit. This position can not be maintained. In *Lewis v. McFarland*, 9th Cranch 151, it was said that the principle that "letters testamentary give to the executors no authority to sue for the personal estate of the testator out of the jurisdiction of the power by which these letters are granted," does not extend to a suit for lands devised to an executor. This is not an action for the recovery of personal property. The purpose and object of this action is to set aside the sale of certain lands described in the bills and amended bills, and to vacate the deeds made in pursuance

thereof. The plaintiffs in this action sue under the will of Burr Wakeman, which vested the title to his lands in his executors and trustees. They are therefore devisees and trustees suing for the protection of rights to the realty derived from and under that will, and not in their character as personal representatives, derived from the letters testamentary. By the will, the legal title to the land in controversy was vested in the plaintiffs in this action, and, as I have before said, being citizens of a different state from the defendants in this action, they were entitled to be heard in this court.

The next position insisted upon by the defendants to defeat the plaintiffs' action is, that if the plaintiffs' position is true, that the proceedings were absolutely void under which the lands were sold, that then the plaintiffs have a complete and adequate remedy at law, and this court sitting in equity is without jurisdiction to grant the relief asked for.

It will be observed that the lands in question were sold by virtue of the proceedings in the Boone Circuit Court and passed into the hands of numerous parties each of whom claims under sale made under the order of that court relating to the whole of the land in dispute.

The state court based its proceedings upon steps previously taken upon the forfeiture of these lands as delinquent lands. The lands prior to the alleged forfeiture and sale under the order of the court constituted one body, and were held by one person, Burr Wakeman. If the attempt to forfeit them was not in law a forfeiture that divested his title, or if the proceedings in the Boone Circuit Court were unauthorized and void, then the title as to all the lands remains in Wakeman, and passed under his will to the plaintiffs.

Each defendant's title depends upon the same questions, and those questions all have relation to the proceedings in the Boone Circuit Court and to the attempt to forfeit the lands for non-payment of taxes. It is a case of one person having a right against a number of persons, which may be determined as to all the parties interested by one suit. If the plaintiffs brought ejectment against one of the defendants and succeeded, the judgment would not include the other defendants, although the question in each case would be pre-

cisely the same. But if the plaintiffs can, by one comprehensive suit, have their rights declared and secured, as to all the lands, the possession of which is withheld by the defendants, each claiming a particular parcel, but all basing their claims upon the same proceedings instituted by the officers of the state, may they not invoke the jurisdiction of a court of equity upon the familiar ground that by suing in equity and bringing all the defendants before the court in one action, they can avoid a multiplicity of suits? I think they can.

1. Pomeroy's Eq. Juris. § 245 to 269 inclusive.

The contention that Wakeman, and his executors, since his death, were necessary parties to the proceedings in the Boone circuit court, is not sound. If the steps taken to forfeit the lands in question for the non-payment of taxes, were in accordance with law, then the title passed from the owner to the state. The proceedings which the statute authorized to be instituted in the circuit court for the sale of forfeited land by the school commissioner constituted the mode ordained by the state for selling its own land. As the title of the former owner was gone he had no right to be a party to those proceedings, or to be heard in reference thereto in the court of original jurisdiction or in the supreme court of appeals of the state. His right was simply to redeem within a prescribed time. These principles are decided in *McClure v. Maitland*, 24 West Virginia. I am not inclined at this time to question the soundness of the decision of the court in that case, and therefore accept it as embodying a sound construction of the statutes of West Virginia relating to that subject. In the view I take of this case it is unnecessary to pass upon all the questions considered by the court in that case, as the facts in this case differ materially from it.

The next question presented for consideration I hold to be vital, the one upon which, it is apparent, the case rests. It is, whether the sale of these lands was void. The Code of West Virginia provides for the sale of real estate by the sheriff of the county in which the lands, or a greater part of them, lie, for taxes, if it has been returned delinquent for the non-payment of the same. Code of West Virginia, chapter 31, sections 4 to 9 inclusive.

Section 31, chapter 31, of the Code, provides that when

any real estate is offered for sale and no person present bids the amount of taxes, interest and commissions due thereon, the sheriff shall purchase the same on behalf of the state, for the taxes thereon, and the interest on the same, and shall make out a list thereof under a caption provided for in that section, and underneath the caption, "Shall be the several columns provided for in the 10th section with a like caption to each column with one exception." The officer making the list is required to certify it under oath and return the list, with a certificate of his oath attached, to the auditor of the county, now clerk of the county court, within ten days after the sale, who should within twenty days after the return record the same in a well bound book, and transmit the original to the auditor of the state.

It is conceded that the sheriff made a sale, under this statute, of the lands in controversy, and purchased the same on account of the state. But in so doing, it is claimed by the plaintiffs in this action, he failed to comply in several respects with the terms of the statute, and that in consequence of his failure the proceedings were irregular and the deeds founded upon them are null and void.

It will be observed that the heading of the list is prescribed by section 31, and the form of it after the heading is made must conform to the provisions of section 10. This section, amongst other things, requires the officer to return the "Estate held" in the lands sold and purchased by the state, "In what district the land sold was situated, and charged with taxes, and the description of the same." Section 13 requires and prescribes the form of an affidavit to "be appended to the list." Section 31 requires the heading of the list to contain the name of the county in which the land is sold and the month and year in which the sale is made, as well as the year in which the land was sold for the non-payment of taxes. An inspection of the list returned shows that the officer in returning his list had failed to comply with each of the foregoing requirements, thereby showing great irregularity in the proceedings taken by him.

From what I have said it appears that there were no less than seven requirements of the statute which the officer failed to comply with in making his report.

It is claimed, however, that some of the requirements of the 31st section are merely directory, not mandatory upon the officer, and that the irregularities arising from the failure of the officer to comply with these provisions are not essential, and do not vitiate the proceedings.

In the view I take of this case it is unnecessary at this time to express my assent or dissent to that position. If it was necessary to decide this case, I would pass upon that question, but it is doubtful if I would be able to find any real or supposed reason why one positive requirement of the statute is more important than another. This act of the legislature prescribes the terms upon which realty may be sold for taxes and the owner divested of his title. Should not every positive requirement of it be regarded as material to be strictly complied with, otherwise, may not the officer conducting the sale, to some extent, exercise the functions of a judicial officer, deciding what is necessary to be done to comply with the terms of the statute, instead of a ministerial officer to execute its provisions? There would seem to be but one answer to this question. If he can omit any positive requirement of the statute, he may omit all, and thereby arbitrarily divest any owner of his title to realty in arrears for taxes.

No judicial interposition is required to effect the sale of realty for the non-payment of taxes. It was intended that the statute should execute itself, and it would seem for this reason, if no other, that every requirement should be strictly complied with. Ought we not to infer that the legislature, when it declared in its act that the terms upon which realty might be sold when delinquent for taxes, that it regarded all the requirements of the statute as essential. Otherwise, would it not have omitted to insert any provision that was not regarded by it as material?

If this be the true construction of the statute, it would follow that the failure of the officer to comply with any positive requirement of it, would vitiate the sale made by him, which would be fatal to the title of the defendant acquired through the state. But, as we have said, it is unnecessary to decide this question.

There yet remain two other grounds to be considered upon which complainant seeks relief:

First :—It is alleged in the 2nd amended and supplemental bill that the sheriff failed to return his list of lands sold as delinquent for taxes within ten days after the sale and purchase of them by the state.

Second :—That the recorder failed to note the time when the sheriff returned his list of sales.

Both allegations are denied by the answer, and the defendants attempt to show that the statute was complied with in both respects.

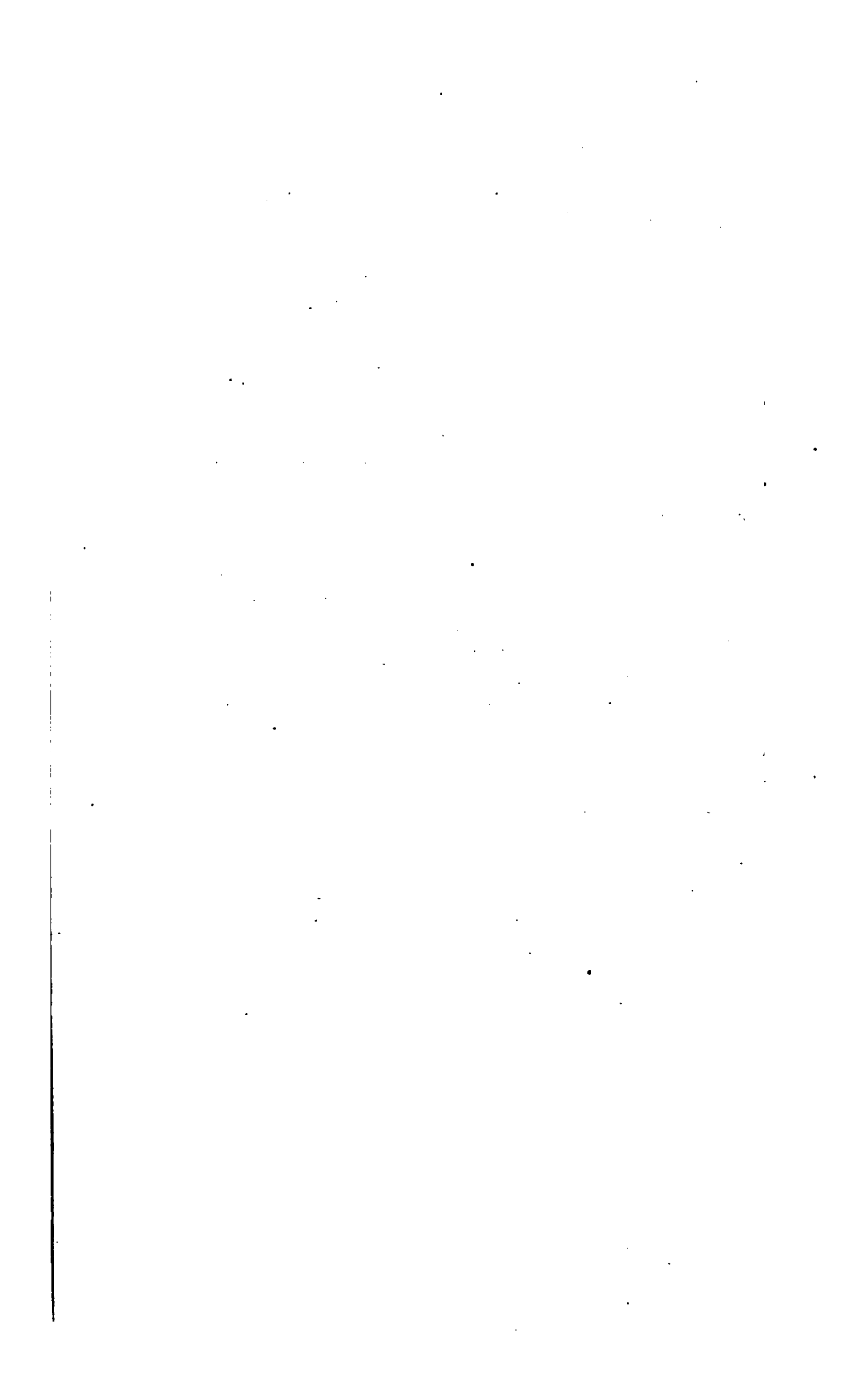
The evidence upon both points seems to be conflicting, but the weight of it strongly supports the conclusion that neither requirement of the statute was complied with, and the effort of the defendants to overthrow both provisions was clearly the result of an afterthought. The neglect of the officers to comply with either is such an irregularity as tends to prejudice the rights of the owner whose lands have been sold. He had a right to call at the office and demand the production of the officer's report for his examination. If he discovered it was not there within the prescribed time, or being there, had not been filed within the time prescribed by the statute, or that the recorder had failed to note the filing of the same, he could rest upon his rights, feeling assured that the steps taken to sell his realty did not divest him of the title to it. Both provisions of the statute are mandatory, and were held by this Court, in the case of *Rich* against *Latham* and others, in 1879, to be so essential that neglect of the officer to comply with either renders invalid the title acquired in pursuance of their action. And this, I think, is now the settled law of this state, as ruled in the case of *Barton's Heirs v. Gilchrist*, 19 W. Va. 223. *Simpson v. Edmiston*, 23d W. Va. 675. *McCallister v. Cottrille*, 24th W. Va. 173.

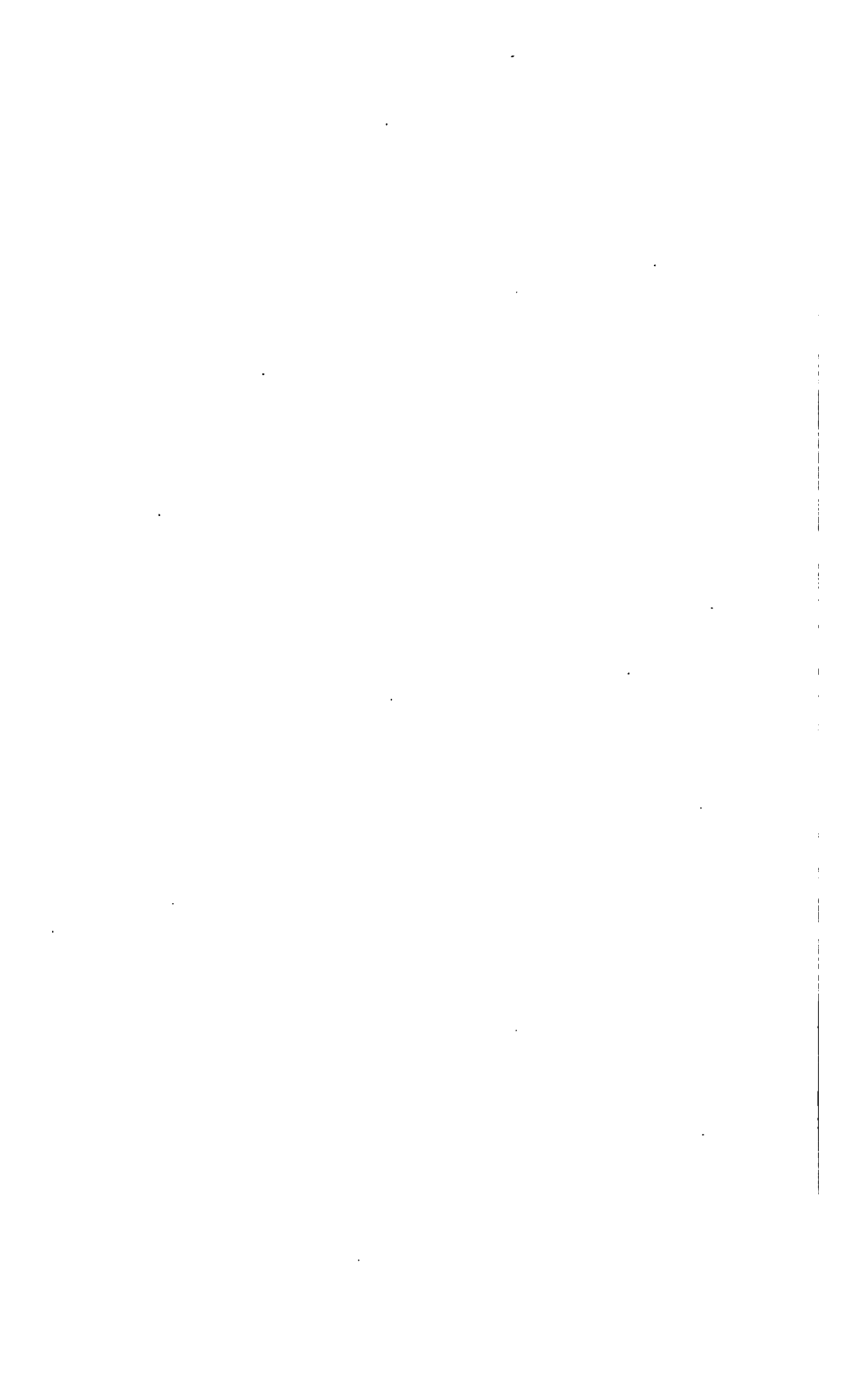
Before leaving this branch of the case the significant fact should not be overlooked, that the last amended bill charges that the affidavit was not returned within the time required by the statute, to which allegation no answer has been offered or filed, although the absence of such an answer was commented on at the time of the hearing of this cause. I have heretofore spoken of this omission upon the part of the officer as being a positive requirement and one which I hold to be essential.

It is contended, however, by the defendants, that the last amended and supplemental bill setting up this omission of the officer makes an entirely new case inconsistent with the theory of the original and the first and second amended bills, and, in support of this position defendants rely upon *Shields v. Barrow*, 7th Howard, 137.

In this position I do not concur, for the reason that that case is entirely different from the one before us. The object of the present suit is to obtain a decree settling the right of the plaintiffs to these lands as against the claim of the defendants based upon certain proceedings taken by the officers of the state, in connection with their forfeiture for the non-payment of taxes. The original bill assails the title of the defendants, derived from those proceedings, as void, and asks a decree declaring the title of the plaintiff to be good as against the defendant. The plaintiff started out with the idea that the proceedings of the Boone Circuit Court were void principally because of their not being made parties thereto. The last amended bill only assigns an additional ground for holding such proceedings, and the sales under them to be void. This proceeding being in a court of equity, under the rules of equity pleading, it does not make a new and different case. *Hardin v. Boyd*, 113 U. S., 753 and the authorities there cited.

It follows, from what we have said, that a decree against the defendants, declaring the sales to them by the commissioner, and the proceedings in the Boone Circuit Court, under which the sales were had, to be void as against the plaintiffs, will be passed.





INDEX.

ACCOUNTING. See *Guardian and Ward* 1-8.

ACQUIESCENCE. See *Deed* 13.

ANSWER.

1. An answer containing new matter calls for a reply in writing under Code c. 25 ss. 35, 36, only when such new matter in its nature as applied to the cause calls for affirmative relief against some of the parties, and is not simply matter of defence of plaintiff's case; and it may by its matter call for such reply only from certain of the parties and not from others, or only as to a part of the matter and not as to the residue thereof. *Smith v. Turley* 14.

APPEAL.

1. Upon a writ of *certiorari* used as an appellate proceeding to bring to the Circuit Court for review a judgment or order of an inferior tribunal, the Circuit Court should decide all matters of law and fact, including those on the merits fairly arising on the record, either affirming such judgment or order, or reversing or modifying it, and should render such judgment, as the inferior tribunal should have rendered, or remand it to that tribunal, where further proceedings are necessary with distinct decision on the points involved in the latter event. *Alderson v. Commissioners* 454.
2. The Circuit Court, where such further proceedings are necessary can not retain and try the cause, but must remand it to the inferior tribunal for such proceedings. *Id.*
3. County commissioners in canvassing returns of an election for congress on a re-count sign various exceptions for alleged errors taken by one of the candidates voted for, and the count is completed and result declared. The party excepting obtains a *certiorari* to review the action of commissioners, and the Circuit Court reverses it, and remands the matter to them, with directions to again perform the work of canvassing the returns. *Held*, that commissioners are not *functus officio*, but are yet competent to canvass the returns in compliance with the order of the Circuit Court. *Id.*

APPEAL.—Continued.

4. Orders made pending a cause suppressing portions of the evidence offered, allowing the retaking of depositions, and other orders regulating the preparation of the cause for a hearing in the court below, in order to be good grounds for an appeal, must appear, not only to be erroneous, but the appellant must show by his record that he was prejudiced by the entries of such orders. *Boggs v. Bodkin* 567.
See *Injunction* 2.

APPELLATE COURT.

1. Where questions of fact are referred to and passed upon by a commissioner, and the findings of the commissioner are overruled and disaffirmed by the Circuit Court, the appellate court must determine for itself from the facts and circumstances disclosed by the record, whether it will sustain the conclusion of the commissioner or that of the Circuit Court. *Roots v. Kilbreth* 585.
2. A case, in which the appellate court upon the facts and evidence sustained the action of the Circuit Court in overruling the findings of the commissioner and in sustaining exceptions taken to the commissioner's report. *Id.*

ASSIGNMENT. See *Insurance* 2.

ATTACHMENT.

1. In an attachment-suit in equity, to which the debtors of a non-resident defendant are made parties and charged to be such debtors, it is not error to decree, that the latter shall pay the amount found to be due from them to the non-resident, simply because the order of attachment had not been served upon them. *McKinsey v. Squires* 41.
See *Const. Law* 1; *Principal and Surety* 1 (II.)

BILL OF EXECEPTIONS. See *Reversal of Judgment* 5.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Where a joint and several promissory note was executed by D. as principal and B, N. & P., as sureties payable to G., and N. pays a portion of said note after judgment has been rendered against him alone thereon, if such payment was made by N., when he was indebted to D., the principal, in an amount sufficient to pay the judgment so obtained against him, or if after the maturity of said note said N. had in his possession or under his control money belonging to said D. sufficient to pay off said note or judgment and did not so apply it but paid it back to said D., said N. is not entitled to contribution from his co-sureties, even if he afterward paid said note or judgment out of his own money. *Neely v. Bee* 519.
2. A surety is entitled to the benefit of any indemnity or security held by his co-surety; and if the co-surety has it in his power

BILL OF EXCHANGE AND PROMISSORY NOTES.—*Cont'd.*
to pay off and discharge the indebtedness, for which they are jointly liable out of money or other thing belonging to the principal, and fails to do so, he can not call upon his co-surety for contribution. *Id.*

BILL OF REVIEW.

1. The filing of a bill of review for newly-discovered evidence is not a matter of right but rests in the sound discretion of the court. *Sewing Machine Co. v. Dunbar* 335.
2. A bill of review for newly-discovered evidence will not lie, where the evidence is simply confirmatory or cumulative. It must be decisive in its character such as ought, if true, upon rehearing to produce a different decree, and of which the party was ignorant at the time of the decree and could not have learned by the exercise of reasonable diligence. *Id.*
3. If a party allege the finding of a document since the decree, which would have been relevant evidence for him on the hearing and knew of its existence and contents, though he made diligent search for it before the decree without finding it, yet if he could have proven its existence and contents by the evidence of witnesses, he should have done so, and can not on that ground sustain a bill of review. *Id.*
4. Where the court of appeals decides the principles of a cause, and sends the cause to the Circuit Court with a mandate to enter a decree of specific character and for further proceedings merely to execute it, though there can not be a bill of review for error of law, yet there may be for after-discovered matter. But to allow a bill of review in such case great caution should be observed, and the new matter should be very material and newly-discovered and unknown to the party at the date of the decree, such as could not have been discovered by the use of reasonable diligence, and not simply confirmatory or cumulative in its nature but decisive in effect; such as ought if true, to call for a different decree. *Id.*
See Vendor and Vendee 1 (I.)

BOND.

1. Where a suit is brought in a State court and the defendant has been arrested and under the Code, c. 106, ss. 31, 32, has given bond to answer interrogatories filed before a commissioner of said court or in default thereof to satisfy the decree rendered in said suit, a plea setting up the fact, that said suit has been removed to the United States court, and that no decree has ever been rendered in said suit by the State court, is immaterial. *State v. Peck* 606.
2. In such case, if a decree has been rendered by the United States court against the defendant, and he fails to answer interrogatories filed before a commissioner of the State court, as required in the condition of said bond, he and his sureties upon said bond

BOND.—Continued.

will be liable for the amount decreed against him in the United States court. *Id.*

BOUNDARIES.

1. In the description of lands as to questions of boundaries the rule is settled in Virginia and West Virginia, that natural landmarks, marked lines and reputed boundaries will control mere courses and distances or mistaken descriptions in surveys and conveyances. *Gwynne v. Schwartz* 487.
2. The statement of the quantity of land supposed to be conveyed, and inserted in deeds by way of description, must not only yield to natural landmarks and marked lines, but also to descriptions in deeds by courses and distances. *Id.* 488.
3. Disputed boundaries between two adjoining lands may be settled by express oral agreement, executed immediately and accompanied by possession according thereto. *Id.*
4. Long acquiescence by one adjoining proprietor in a boundary established by the other is evidence of such agreement so fixing the division-line between them. *Id.*
5. Such acquiescence may be shown by the adjoining land-owners having actual possession and cultivating to such line; or, if the line run through woods, by the proprietor, who established such division-line, with the knowledge of the adjoining land-proprietor always clearing up to this line and, with his like knowledge cutting timber and peeling bark up to this division, the other land-owner making no objection to such claim or such acts of ownership, though he was present when such acts were being done. *Id.*
6. Such acquiescence, in this State for a period of over ten years will justify a jury in inferring, that such parol agreement establishing such division-line existed; and a verdict based on such inference ought not to be set aside as plainly contrary to the evidence. *Id.*

BREACH OF PROMISE OF MARRIAGE.

1. A suit in equity may under the provisions of the statute be maintained to recover damages for the breach of a marriage contract. *McKinsey v. Squires* 41.
2. Where seduction has been practiced under color of a promise to marry, it is proper to prove in an action for the breach of such promise the seduction in aggravation of such damages. *Id.*

BURDEN OF PROOF. See *Fraudulent Conveyance*, 2, 9; *Contract* 3.

CERTIFICATE OF ACKNOWLEDGMENT. See *Deed* 2, 4, 7.

CERTIORARI.

1. A petition for a writ of *certiorari* to bring to the Circuit Court for review proceedings of the commissioners of a County Court

CERTIORARI.—*Continued.*

in the canvass of the returns of an election filed by a candidate, which fails to show, that he was prejudiced by the errors complained of, is not sufficient to justify the award of such writ, and will be *held* bad without demurrer at the hearing; and a judgment of a Circuit Court reversing the action of the commissioners upon a *certiorari* based on such petition will be reversed here with costs in this Court against the party who filed such petition. *Fleming v. Commissioners* 637.

See *Appeal* 1.

CHANCERY PRACTICE. See *Mortgage* 9.

CIRCUIT COURT. See *Appeal* 1-3; *Appellate Court* 1, 2.

CITIES. See *Corporations* 1, 2, 3.

COMMISSIONER OF COURT.

1. If a commissioner fails entirely to report with reference to any of the matter referred to him, the court should refer the matter to him to be again reported upon, and this should be done, though no except one to such report. No one's right can be regarded as abandoned or prejudiced by his failure to except to such report.

Childs v. Hurd 68.

See *Appellate Court* 1, 2.

COMMON-LAW PLEADING. See *Answer* 1; *Bond* 1; *Limitations of Actions* 1; *Railroad Companies* 2.

COMMON-LAW PRACTICE. See *Railroad Co's* 1; *Reversal of Judgment* 4.

COMPENSATION. See *Guardian and Ward* 1, 4.

CONDITION PRECEDENT. See *Specific Performance* 5, 6.

CONSIDERATION. See *Deed* 1, 3, 4.

CONSTITUTIONAL LAW.

1. Our statute (Code 1887, c. 106, s. 1), which provides that an attachment may be sued out in equity for the recovery of damages for a wrong, is constitutional. *McKinsey v. Squires* 41.

See *Corporations* 8; *License* 1; *Vacancy in Office* 1-5.

CONTEMPT. See *Injunction* 2.

CONTESTED ELECTION. See *Vacancy in Office* 1-5.

CONTINUANCE. See *Principal and Surety* 1 (IV.)

CONTRACT.

1. Where the contract of a corporation purports to be sealed with its corporate seal, and it is proven to be signed by the proper agents of the corporation, the presumption is that the seal was affixed by the proper authority, and such contract will be held valid until the contrary is shown. *Fidelity Co. v. Railroad Co.* 244.
2. The presumption of authority to affix the corporate seal to a contract will not be overcome by the mere fact that no vote of the directors authorizing it is shown. *Id.*
3. Where a County Court made a contract for the construction of a bridge in accordance with certain specifications attached to and made part of the contract, in a suit by the contractors to recover a balance claimed to be due them on said contract, after the work was completed and received by the county, as they claim, the plaintiff, must show affirmatively, that they have complied with said contract and specifications, or that said work has been received, before they will be entitled to recover. *Chenoweth v. County Comm'rs.* 628.
4. If the plaintiffs themselves offer in evidence an order of the County Court, which shows, that the County Court acting upon the report of the committee appointed to superintend the building of said bridge, which stated that it would take all, that remained unpaid, to make good certain deficiencies in said work; and shows on its face, that said court declines to receive and pay for said work, said order is competent evidence upon the question as to whether said work had been received by the county or not. Following *Kinsley v. Monongalia Co.* 31 W. Va. 464 (7 S. E. Rep. 445. *Id.*

CONTRIBUTION. See *Bills of Ex. & Prom. Notes* 1, 2.

CORPORATE LIMITS. See *Corporations* 9, 12.

CORPORATIONS.

1. Our statute (Code 1887, c. 43, s. 53) imposes an absolute liability upon cities, villages and towns for injuries sustained by reason of the failure of municipal authorities to keep in repair the streets, sidewalks *etc.* within the corporate limits, provided its authorities have opened or controlled such street or sidewalk, where the injury was sustained, as a public street or sidewalk. *Biggs v. Huntington* 55.
2. In an action against such city or town the plaintiff must therefore allege and prove that the street or sidewalk upon which the injury occurred at the time and place when the injury was sustained was controlled and treated by the municipal authorities as a public street or sidewalk and opened as such. *Id.*
3. This duty of a city or town in this State, to keep its streets, sidewalks, alleys *etc.* safe for foot-passengers and vehicles, is not met by keeping simply the bed of the highway or the surface of the sidewalk in proper condition; but such duty is violated, if a

CORPORATIONS.—*Continued.*

- dangerous excavation or open well be permitted so close to the margin of the sidewalk or highway as to make the use of them as such dangerous. But if a traveler unnecessarily for his own convenience deviates designedly from the highway and in so doing meets with an accident outside of the highway, the city can not be responsible, no matter how near the highway the obstruction may be. *Id.*
4. Where the statute law of a state requires, that, before a corporation can do any business, it shall record in a certain county the certificate of its incorporation, this is a condition precedent, and the corporation has no power to transact any business, till such condition is complied with, and such corporation has really no existence, till such certificate of incorporation is so recorded. *Childs v. Hurd* 68.
 5. A corporation exists only in contemplation of law and by force of law and can have no legal existence beyond the state or sovereignty, by which it is created. *Rece v. N. N. & M. V. Co.* 165.
 6. While a corporation by the same name may be chartered by two states clothed with the same capacities and powers and intended to accomplish the same objects and be exercising the same powers and duties in both states, yet in law there will be two distinct corporations,—one in each state,—with only such corporate powers in each state, as are conferred by its creation in that state. *Id.*
 7. One state can not by a mere legislative declaration make all corporations created by charter or by the laws of other states domestic corporations of such state; at least it can not by such declarations deprive the foreign corporation of its right to resort to the Federal courts, in cases where such right is conferred by the constitution and laws of the United States. *Id.*
 8. So much of section 30 chapter 54, of the Code of this State, as declares, that foreign railroad corporations doing business in this State shall in all suits and legal proceedings be held and treated as domestic corporations of this State, and requires every such corporation to file an agreement to that effect, so far as it attempts to deprive such corporation of the right to remove to the Federal courts suits brought by or against it in the courts of this State in cases, in which it would otherwise be entitled to such right, is inoperative and void; and such foreign corporation may exercise such right in any proper case, notwithstanding it has executed and filed such agreement in pursuance of the provisions of the statute. *Id.*
 9. It is not necessary to the validity of an order made by the Circuit Court under chapter 47, § 49, Code 1887, approving a change of the corporate limits of a town, that the order should show on its face, that the town contains less than 2,000 inhabitants. *Davis v. Pt Pleasant* 289.
 10. Where a town under said chapter of the Code extends its cor-

CORPORATIONS—*Continued.*

porate limits so as to include agricultural or farming lands and imposes municipal taxes on them, though they are not laid off into streets and alleys and not laid out in lots and are not so near streets or alleys as to be directly benefited by them or derive any peculiar benefit from the incorporation, the courts can not affect its action or prevent such taxation. *Id.*

11. It is not necessary to the validity of an order of the Circuit Court under Code 1887, c. 47, s. 49, approving a change of the limits of a town, that the order show on its face, that the town contains less than 2,000 inhabitants. *Bridge Co. v. Pt. Pleasant* 328.
12. A town may under said chapter of the Code, extend its corporate limits so as to include a railroad bridge across the Ohio river and impose municipal taxes on such bridge. Such taxation is not *ultra vires*. *Id.* 329.
13. F. was arrested in June, 1887, and brought before the Mayor of the city of Charleston for a violation of one of the city-ordinances in selling beer without license within one mile from the corporation-limits, was tried and convicted by the mayor and fined \$50.00 and costs, and was committed to the street-commissioner, to work out his fine. It appears, that the warrant for his arrest was issued by the recorder, but it does not appear, whether he was arrested within or beyond the city-limits. F. petitioned for and obtained from the Circuit Court of Kanawha county a writ of *habeas corpus*. The return made by the mayor to said writ discloses the facts above stated and also alleges, that F. had violated said ordinance. F. demurred to said return, and upon the hearing the Circuit Court dismissed said writ with costs.

HELD :

- I. The mayor of the city of Charleston had jurisdiction to hear and determine said cause.
- II. Under the facts disclosed the Circuit Court acted properly in overruling said demurrer and dismissing said writ of *habeas corpus*. *Flack v. Fry* 364.

See *Contract* 1, 2 ; *Deed* 13.

COSTS.

1. Generally, if pending an appeal or writ of error the matter of controversy in the suit be settled, this Court will simply dismiss the appeal or writ of error without deciding the merits merely to determine as to the question of costs and will not pass on the costs. Otherwise, under the circumstances of this cause. *Ferguson v. Millender* 30.

COUNTY COMMISSIONERS. See *Appeal* 3 ; *Certiorari* ; *Injunction* 1, 2.

COURSES AND DISTANCES. See *Boundaries* 1, 3.

DAMAGES. See *Constitutional Law* 1 ; *Breach of Promise of Marriage* 1, 2 ; *Railroad Companies* 1-3.

DEBTOR AND CREDITOR. See *Deed* 9-11.

DECLARATION. See *Railroad Co's* 1, 2.

DECREE. See *Reversal of Judgment; Sale* 2.

DEDICATION. See *Public Road* 1.

DEED.

1. The recital in a deed, that the consideration was valuable and paid, is no evidence of such payment as against creditors of the grantor assailing such deed as voluntary and therefore fraudulent as to them. *Childs v. Hurd* 67.
2. If a deed from husband and wife conveying land of the wife be void as to her because of defective certificate of her examination and acknowledgment, and after the death of her husband she convey the land to another with notice of the former deed, yet the second purchaser will not be affected by such notice, the former deed being void and passing no right legal or equitable, and the second purchaser does not hold the land as trustee for the first purchaser, and equity will not compel him to convey to the first purchaser nor will it enjoin the second purchaser from prosecuting an action of ejectment to recover the land from the first purchaser's possession or that of his vendee. *Land Co. v. Laidley* 134.
3. Nor will equity re-fund to the first purchaser or his vendee the consideration paid by the first purchaser by personal decree against second purchaser, or by charging it on the land. The covenant of warranty in the deed binds the woman no further than to pass her land, even if valid. *Id.*
4. Though during coverture the wife bring suit against her husband and others to assert her right to land acquired by her husband in his name with the consideration paid by such first purchaser, reciting in her pleading, that she had executed such deed to such first purchaser and received the consideration, and obtained a decree giving her such land, and declaring it her separate estate, that will not estop her or such second purchaser, from recovering the land from the first purchaser or his vendee. *Id.*
5. Though in such suit she so recite her former deed, and though she and her husband make a deed to another person for one acre within the bounds of the tract mentioned in the void deed, which that deed had reserved to her, describing it as the one acre reserved in the void deed, referring to that deed as a deed, yet this is no ratification of such void deed. During coverture she can not ratify such void deed by mere admissions or recitals or other acts *in pais*, but only by acknowledgment of the void deed, or the execution of another instrument with privy examination, acknowledgment and recordation, as prescribed by the statute. *Id.*

DEED.—*Continued.*

6. Where by deed land was conveyed directly to a married woman prior to the Code of 1868, such conveyance did not create in her a separate estate, but the husband become entitled to a freehold estate in the land, which would continue at least during the joint lives of the husband and wife, with remainder in fee to the wife. *Id.* 135.
7. In such case, if the husband and wife by a deed void as to her for want of a proper certificate of her examination and acknowledgment convey the land to a party and put him in possession, such purchaser is entitled to hold that possession until the death of the husband, and the wife or her heirs or any one claiming under them has no right of entry until the husband's death, and right of action does not accrue to them, nor does the statute of limitation run against them, until his death. *Id.*
8. A deed of conveyance bearing date the 8th day of June, 1850, to a husband and wife residing in Barbour county, then in Virginia, for a tract of land situated in said county did not confer upon the husband title to the undivided moiety of said land, but said husband and wife took by entireties. *Bank v. Corder* 232.
9. A creditor of the husband files a bill to subject the real estate of the husband to the payment of his debt. It is error in the court upon the above state of facts in regard to the acquirement of title by the husband and wife to hold, that the husband is entitled in fee-simple to the undivided one half interest in said tract of land, and to direct said undivided half to be sold for plaintiff's debt. *Id.*
10. Although a deed may be fraudulent and void as to creditors, it is nevertheless valid and binding between the parties to the fraud, which brought it into existence; and it is error in the court to set aside and annul such deed *in toto*. *Id.*
11. A deed of conveyance is made directly from the husband to the wife for a tract of land, and as part of the consideration she agrees to pay B. \$300.00 and H. \$100.00 with interest on said amounts, which the husband owes to B. and H., and to secure which amount the vendor's lien is reserved. Although said deed may be set aside as to general creditors as fraudulent, the liens thus reserved must be respected as liens on the equitable title conveyed as of the date of the recordation of said deed, if said claims are valid in other respects. *Id.* 233.
12. Where a deed is delivered by the grantor to a third person to be held in escrow, until the grantee shall have paid a specified debt, and the deed is delivered before the debt is fully paid, but it is subsequently paid, *held* the delivery will be operative, and the deed valid, at least from the time the debt is fully paid. *Connell v. Connell* 319.
13. Where those to be affected by the improper delivery and recordation of a deed were fully acquainted with the facts, and acquiesced therein for an unreasonable time, and until the rights of

DEED.—*Continued.*

third parties have intervened, they will not be permitted to avoid such deed. *Id.*

14. After the corporators had signed an agreement to become a corporation, and before the charter had been obtained, a deed conveying land to such corporation by name was signed and acknowledged by the grantor and delivered to a third party with directions to retain it, until the corporation obtained its charter and organized, and then to deliver it to the corporation; and after the charter had been received, and the corporation had organized under it, such third person delivered the deed to and it was accepted by the corporation. *Held*: The said deed operated as a valid conveyance of said land to the corporation from the date of delivery of said deed to it. *Bank v. Lumber Co.* 357.
15. A deed conveying a tract of land by boundary, but excluding a tract of fifty acres theretofore sold to another other than the grantee in such deed, does not pass to such grantee legal title to said fifty acres, even though no deed for said fifty acres had been made to such other person, who purchased it. *Low v. Settle* 600.

DEMURRER. See *Railroad Co's.* 1.

DEVISAVIT VEL NON. See *Wills* 1, 5.

EJECTMENT.

1. In ejectment, when both parties claim to derive title from the same third person, the rule is well settled, that it is *prima facie* sufficient for plaintiff to prove such common derivation of title without proving, that such third person had title to the land in controversy. *Low v. Settle*, 600.
2. A plaintiff in ejectment against one in actual possession must recover on the strength of his own title, not on the weakness of his adversary's. *Id.*
See *Husband and wife* 9, 10.

ELECTIONS.

When neither the speaker of the house of delegates nor the joint assembly of both houses of the legislature convened under section 3 of article VII of the constitution of this state for the purpose of opening and publishing the returns of the election for the office of governor does in fact open and publish the returns in respect to said office or declare any person elected to that office, this Court can not by *mandamus* adjudge the person, who appears from the returns certified to the speaker of the house to have received the highest number of votes for that office, to be the governor and compel the person, who was the governor during the preceding term to deliver, the office and its insignia to him. *Goff v. Wilson* 393.

See *Appeal* 1-3; *Certiorari*; *Injunction* 1, 2.

EQUITY.

1. A doubtful or partial remedy at law does not exclude the injured party from relief in equity. *Nease v. Ins. Co.* 283.
2. A suit may be maintained in a court of equity by or in the name of the sheriff, under Code 1887, c. 141, s. 15, where there is a conflict between two or more execution-creditors in respect to the same fund or property, and where such suit will avoid a multiplicity of suits. *Id.*
See *Attachment 1*; *Breach of Promise of Marriage 1*; *Constitutional Law 1*; *Husband and Wife 10*.

ESCROW. See *Deed 12, 13*.

ESTOPPLE. See *Specific Performance 3*; *Insurance 3*.

EVIDENCE.

1. B. executed and delivered to P. a writing in these words: "I this day agree to pay Wm. R. Pasley all the money, that Jesse Pasley's timber comes to after deducting out all the money, that * * * * Jesse Pasley owes me." At the time this writing was executed, B. had been garnished in a Kentucky court by a creditor of Jesse Pasley and was subsequently by the judgment of said court compelled to pay said debt to said creditor. In an action of *assumpsit* by P. against B. on said writing the record in said Kentucky suit is admissible in evidence to prove the payment of the amount, for which he was so garnished, as a set-off against the claim of the plaintiff. *Pasley v. Bromley*, 21.
2. To impeach a witness by proving statements of his on another occasion inconsistent with or contradicting his statements on the trial, the statements must be material to the case not collateral. *State v. Goodwin* 177.
3. If the statements be collateral to the case and be drawn out on cross-examination and not in chief, the party drawing them out is bound by the answer and can not introduce evidence to contradict it. *Id.*
4. Before such evidence to impeach can be admitted, a foundation must be laid by an examination of the witness touching the fact of his having made such statements. *Id.*
See *Boundaries 4-6*; *Contract 4*; *Ejectment 15*; *Husband and Wife 4, 7*; *Mortgage 8*; *Reversal of Judgment 4*.

EXCEPTIONS. See *Record 1*.

EXECUTORS AND ADMINISTRATORS.

1. Two parties are engaged in business in another state,—one living in this state, one in the other,—and the one living in this state dies, and the other becomes one of his executors under a qualification in this state. At his death the business is closed up, and partnership-debts are to be collected and paid, and the effects sold. If, when this is accomplished, the survivor is insolvent, the sureties in the executorial bond are not liable for the interest of the deceased in the partnership; but if said survivor is then

EXECUTORS AND ADMINISTRATORS.—Continued.

solvent, they are liable. *Hooper v. Hooper* 526.

2. If, at the time, when it may be said under the law, that the business was in such condition, that it was the duty of the survivor to turn into his hands as executor the share of the deceased in the assets, the survivor was insolvent, his sureties in such bond are not liable; if he is then solvent, they are liable. *Id.*
3. If, when the survivor makes a statement of receipts and disbursements as surviving partner in winding up the business showing a balance in his hands to be divided, he is insolvent, so that such balance is not substantial assets, his sureties in such bond are not liable for such balance; if he is then solvent, they are liable. *Id.*
4. Liability of sureties in the bond of an executor or administrator is limited by the terms of the covenant of the bond and can not be extended by implication. *Id.*
5. A judgment against an executor is conclusive both as to the validity and amount of the demand on both executors and legatees. *Id.*
6. An executor is not to be charged with a debt, when it becomes due, but only when he actually receives it, unless it is shown to have been lost by his negligence or improper conduct. *Id.* 527.
7. A debt due to an executor individually from a legatee may be insisted on as part payment of the legatee's legacy. *Id.*
See *Principal and Surety* 1 (III); *Trusts and Trustees* 2.

EXHIBITS. See *Record* 1.

EXTENSION OF CORPORATE LIMITS. See *Corporations* 9, 10, 11, 12.

FIXTURES. See *Landlord and Tenant* 1.

FRAUDULENT CONVEYANCE.

1. It is the settled law in this State, that the recital in a deed of the payment of a valuable consideration for the property therein conveyed is not evidence of such payment as against a stranger or a creditor of the grantor assailing the deed, as voluntary and fraudulent as to him. *Cohn v. Ward* 34.
2. But when in such case the conveyance is shown to be founded on a valuable consideration, the burden of proving, that the deed is fraudulent in fact, rests upon the creditor assailing it. *Id.*
3. A trust-deed conveying real and personal property including a stock of store-goods is not *per se* fraudulent, because it postpones the sale of real estate for six months from the date of the deed and authorizes the trustee after taking an inventory of the store-goods to take control of them and sell the same at private sale, if that can be done in six months, and then sell the residue at public auction, in either case the sales to be in the best possible manner for the interests of the creditors of the grantor. *Id.*

FRAUDULENT CONVEYANCE.—*Continued.*

4. Where a trust-deed secures many debts in separate classes or to different persons, the simple fact, that a part of the debts secured are shown to be invalid or voluntary, will not make the deed invalid as a security for other and *bona fide* debts secured therein. *Id.*
5. The fact, that a trustee in a trust-deed is insolvent and untrustworthy will not of itself make the deed void ; but in such case the court may appoint a receiver and administer the trust according to the provisions of the deed. *Id.*
6. In a suit by a judgment-creditor to set aside a deed as fraudulent it is error to set the deed aside *in toto*, as it is valid and binding between the parties to the fraud and void only as to creditors. *Love v. Tinsley* 25.
7. G., who was a merchant in the town of Sissonville, Kanawha county, W. Va., became the owner of a lot in said town containing three fourths of an acre by a deed made to him by M. and wife on the 17th day of August, 1871. When he acquired said lot, his wife, M. G., was the owner of a lot in the same town, which had been conveyed to her by M. and wife by deed dated November 19, 1866, which was recorded on the 3d day of June, 1867. On the 19th of June, 1877, G. agreed with O. to exchange both of said lots in the town of Sissonville for 390 acres of land owned by O. on Blue creek in said county, which agreement was carried into effect on the 23d day of September, 1877, by G. and his wife, M. G., interchanging deeds with O. ; said G. and wife conveying to O. said two lots in Sissonville, and O. conveying to said M. G., the wife of G., the said tract of 390 acres. At the time of this exchange said G. had become involved in debt, and in February, 1879, a bill was filed by his creditors praying among other things that the conveyance made by O. to the said wife of G. might be set aside as fraudulent, and said 390 acres of land might be subjected to sale to pay the creditors of G. represented in said bill.

HELD :

While, under the circumstances it might be proper to decree a sale of said 390 acres of land to satisfy the claims asserted in the bill, yet M. G., wife of G. was entitled to a return of the amount she contributed towards paying for said 390 acres to be measured by the value of said lot in Sissonville owned by her and before a sale of said 390 acres was made, the court should have directed a commissioner to ascertain the value of said lot in the town of Sissonville, which was in the name of the wife of G. on the 23d day of September 1877, when it was conveyed to O., in order that her rights might be respected in the distribution ; and in order to do that, the value of said lot in the town of Sissonville, held at that date by G. , should also have been ascertained ; that is, the said M. G. and the said G.'s creditors are entitled to share in the proceeds of the Blue Creek property in the proportion of the value of the

FRAUDULENT CONVEYANCE.—*Continued.*

respective Slissonville properties contributed by M. G. and M. respectively to the purchase of said property. *Burton v. Gibson* 406.

8. When a father conveys to his son a portion of his estate for a consideration not deemed valuable in law, said conveyance can not be set aside for that cause only in a suit brought for that purpose after the lapse of five years from the date of said conveyance. *Himan v. Thorn* 508.
9. Where a bill filed by a creditor alleges, that a deed from said father to his son was in fact voluntary although reciting on its face a valuable consideration, and the son in his answer denies the allegation and claims, that he paid a valuable consideration for said land, the burden of proof is on the son to show that said consideration was paid, and the recital of the deed is no evidence against the creditor. *Id.*
10. Although fraud in fact after the lapse of five years from the date of the conveyance must be alleged and shown, to impeach such conveyance even as to an existing creditor, yet fraud may be inferred from the facts and circumstances of the case. *Id.*
See *Deed* 1.

FUNCTUS OFFICIO. See *Appeal* 3.

GARNISHMENT. See *Evidence* 1.

GIFTS. See *Husband and Wife* 11, 12; *Specific Performance* 4-8.

GOVERNOR. See *Elections* 1; *Vacancy in Office* 1-5.

GUARDIAN AND WARD.

1. C. is appointed a guardian for A. and G., infant children of J. H., who enlisted in the United States army and was killed in 1863 leaving a widow, who married a widower with eight children in the latter part of the year 1863 and by him became the mother of eight more children. The guardian applied for and obtained a pension for his said wards after considerable delay in November, 1875. In December, 1875, the mother of said wards and her second husband presented a claim to said guardian for keeping, clothing and schooling said wards for eleven years up to December 4, 1875, amounting to \$1,056.00, which was paid by said guardian out of said pension-money as of that date, he taking their receipt for the amount so paid. Said guardian also paid said parties \$105.00 on the 23d day of June, 1878, and \$100.00 on the 6th day of January, 1879, for boarding, schooling and clothing said wards, taking receipts for the amount so paid, but neither receiving nor requiring the production of an itemized account of the claim so presented; and upon a settlement of his accounts before a commissioner on the 20th day of December, 1882, said guardian was charged with \$1,505.53 as received in January, 1876, although really received in December, 1875, and

GUARDIAN AND WARD.—*Continued.*

\$30.00 every three months thereafter until February, 1878, making the aggregate amount received \$1,715.53, and credited with \$1,056.00 as of December 4, 1875, \$105.00 as of June 23, 1877, and \$100.00 as of June 6, 1879, and \$10.00 as of December 10, 1877, paid by said guardian to said parties as aforesaid, said commissioner charging said guardian with no interest upon the amounts so received by him. Upon a bill filed to surcharge and falsify said account and the proceeding had therein, *held*, that the claim presented by the mother and step-father of said wards stands on no different footing, from what it would, if presented by a stranger. *Hescht v. Calvert* 216.

2. That the money so received by said guardian for said wards should have been invested or loaned within thirty days after it was received, and he should have been charged with interest thereon after that time, unless he should have sooner loaned or invested the same. *Id.*
3. An account of this character against an infant should not only be itemized but should be sustained by satisfactory proof; and a guardian, although duly authorized to disburse the principal of his ward's estate for education and maintenance, should require such proof before paying the same. *Id.* 217.
4. Said guardian having failed to lay before a commissioner of accounts a statement of receipts during the several years he had the money of his said wards in his possession and not accounted for, should have no compensation for his services during the years he has thus failed to settle his accounts. *Id.*
5. If the recovery of such claim or any portion of it, could be prevented by illegality of consideration or lapse of time, or by any other fact within his knowledge, the guardian must avail himself of such defense, or he can obtain no credit for the amount paid. *Id.*
6. A guardian who has more than one ward should keep their accounts distinctly, and settle them separately, showing his receipts and disbursements, and the balance in favor of or against each. *Id.*

HABEAS CORPUS. See *Corporations* 13.

HOLDING OVER. See *Vacancy in Office* 5.

HUSBAND AND WIFE.

1. *Quære*, whether a resulting-trust arises in favor of a wife, if the husband acquires property with her separate estate and without her knowledge and consent takes title in his name. If so, the proof must be clear and explicit to establish that fact especially against husband's creditors. *Smith v. Turley* 14.
2. Long lapse of time will defeat its enforcement. *Id.*
3. It must arise at the time the title is taken. No subsequent agreement or payment will create it. *Id.*
4. The wife is incompetent to prove any transaction or communi-

HUSBAND AND WIFE.—*Continued.*

cation personally between herself and her husband going to create or sustain the trust or any admission by him of its existence, not only as against his heirs, but also his creditors seeking to subject the property. *Id.*

5. A husband with the knowledge and consent of his wife at different times receives, or she delivers to him, the proceeds of the sale of her realty, gives her no note or written obligation to repay it, mingles it with his means, uses it in his business for years, keeps no written account of such moneys, nor does she, then becomes insolvent and some eight or ten years after his receipt of the money purchases real estate in the name of his wife; and it is alleged by him and her, that it was paid for with the money so received; and several years afterwards he and she unite in a deed of trust to secure a very considerable debt on said real estate, such debt being a loan to the husband; and before such purchase a judgment is rendered against him for a debt. The lot is liable to the judgment. *Bank v. Atkinson* 203.
6. If, when such purchase is made, any claim, which she may have on him for such proceeds of her real estate, is barred by limitation, that circumstance tends strongly to repel the wife's claim to exempt the land against creditors. *Id.*
7. The law will not from the mere delivery by the wife of her money to the husband or from the permitted receipt by him of her separate estate imply a promise by him to repay her, but will require more,—either an express promise, or circumstances to prove that in such matters they dealt with each other as debtor and creditor. To thus raise a debt against him to the prejudice of creditors, the proof must be clear, full, and above suspicion. *Id.*
8. Points 1, 2, 3 and 5 of the syllabus in *Burt v. Timmons* 29 W. Va. 441, (2 S. E. Rep. 780,) re-affirmed. *Id.*
9. A wife living with her husband on land, which she claims as her separate estate under a right derived from a person other than her husband prior to commencement of the action, can not be turned out of possession by a writ of possession in an action of ejectment against her husband, to which she was not a party. In such case she is as to her claim a person distinct from her husband and must be made a party to the action like any other person, in order to bind her by the judgment. *Bushong v. Rector* 311.
10. In such a case equity has jurisdiction by injunction to restrain the execution of the writ of possession as to her. The parties will be left without prejudice from the decree to test their titles at law. *Id.*
11. Where a wife delivers money or property of her own to her husband, which he uses in his business, the presumption is, that such delivery was intended as a gift; and in order to constitute such delivery a loan as against the creditors of the husband, the

HUSBAND AND WIFE.--Continued.

wife must prove an express promise of the husband to repay, or establish by the circumstances, that it was a loan and not a gift. *Zinn v. Law* 447.

12. When the facts and circumstances tend to show, that a gift was intended, and that the husband used and dealt with the property as his own, the mere parol testimony of the husband and wife of a private understanding between themselves, that a transaction should be considered or was intended as a loan to the husband by the wife and not a gift, will not as against the creditors of an insolvent husband rebut the presumption of a gift. *Id.* 448.

See *Deed* 8-11.

IMPEACHMENT. See *Evidence* 2-4.**INJUNCTION.**

1. Equity has no jurisdiction to enjoin commissioners of a county Court from certifying to the governor the result of their canvass of the vote in their county for a representative in the congress of the United States. *Alderson v. Comm'rs.*
2. An appeal from a decree in a suit in equity will not bring up for review an order discharging a rule to show cause, why the party shall not be punished for contempt in disobeying an order of injunction made in such suit. *Id.*
See *Husband and Wife* 10 ; *Jurisdiction* 1, 2 ; *Nuisance* 1.

INSTRUCTIONS.

1. Instructions, which are not based upon or applicable to the facts proven in the case, should not be given to the jury, although they may be correct as abstract principles of law. *Coffman v. Hedrick* 120.
See *Railroad Companies* 3.

INSURANCE.

1. Where a policy of fire insurance provides, that the policy shall be void in any case of a transfer or change of title in the property insured or the foreclosure of a mortgage thereon, the execution of a trust-deed on the property after the insurance was made, under which no sale had been made at the time of the loss, will not avoid the policy. *Nease v. Ins. Co.* 283.
2. An assignment of a fire insurance policy subsequent to the loss is valid regardless of the conditions of the policy. *Id.*
3. When the requirements of the policy make it the duty of the insured to submit with the proof of loss a certificate of the nearest magistrate, and a certificate is furnished, to which no objection is made within a reasonable time, the insurer will be estopped from making objections on the ground that it is not by the nearest magistrate. *Id.*
See *Rescission of Contract* 2.

INTEREST. See *Guardian and Ward* 2.

INTERVENTION. See *Mortgage* 9.

ISSUE OUT OF CHANCERY.

1. A chancellor should not direct an issue out of chancery, until the plaintiff has thrown the burden of proof upon the defendant. Therefore, where there is a direct conflict between two witnesses, the one affirming and the other denying the fact to be proved, no issue should be directed ; and if one is directed, upon which the jury render an affirmative verdict, and a decree is made accordingly, the appellate court will reverse the decree, because the issue was improperly ordered. *Sands v. Beardsley* 596.

JUDGMENT.

1. It is error to render judgment against several defendants, one of them not served with process and not appearing, for which he may under section 5, chapter 134 of the Code, reverse the judgment by motion. *Ferguson v. Millender* 30.
2. If he make such motion, and it is overruled, the decision of the Circuit Court overruling such motion makes such judgment valid and binding though void, unless such decision be reversed ; and he is entitled to reverse it, though the judgment has been satisfied by another of the judgment-debtors. *Id.*
See *Partners and Partnership* 1 ; *Reversal of Judgment*.

JUDGMENT-CREDITORS. See *Equity* 2.

JUDICIAL SALE. See *Sale* 1, 2.

JURISDICTION.

1. In an action of *assumpsit* by a private corporation, authorized by its charter to levy tolls upon persons using a river, which had been improved by it, against the defendant for tolls, the defendant pleaded *non assumpsit*, and there is a judgment for the plaintiff for less than \$100.00. Upon a writ of error by the defendant, *held*, this Court has no jurisdiction to review the judgment of the Circuit Court, although the record shows that the real defence to the action was, that the condition of the river was such, that the plaintiff had no right to levy the toll, for which the judgment was recovered. *Miller v. Navigation Co.* 46.
2. A court of equity has no jurisdiction to enjoin the secretary of state from delivering to the speaker of the house of delegates the sealed returns of an election for governor properly transmitted to him ; and such injunction will be treated as a nullity. *Fleming v. Guthrie* 1.
3. This Court will not award a writ of prohibition against a Circuit Court to prohibit from proceeding by *mandamus* to compel the secretary of state to deliver such returns on the petition of a party, who alleges no other ground or interest in the matter than the

JURISDICTION.—*Continued.*

fact, that he is the plaintiff in said injunction suit, and that the Circuit Court has ignored his injunction, although it appears, that said court had no jurisdiction to award said *mandamus*. *Id.*

LACHES. See *Deed* 13 ; *Specific Performance* 7, 8.

LANDLORD AND TENANT.

A tenant may remove fixtures, which he has put on leased premises, at any time during his lease, or while he continues tenant, but after the expiration of the lease and the surrender of the premises to the landlord he can not enter on the premises and remove any fixtures, for when he quits the premises leaving his fixtures behind him, it will be presumed, he intended to abandon them. *Childs v. Hurd* 68.

LICENSE.

That clause of section 2, c. 32, Code, as amended by chapter 17, Acts 1885, which reads, "Nor shall any agent travelling with one or more horses sell any lightning rod, sewing-machine, or organ or other musical instrument without a state license therefor," is not unconstitutional, as applied to such agents selling Singer sewing-machines manufactured out of this state. *State v. Richards* 348.

LIMITATIONS OF ACTIONS.

On the 16th day of June, 1865, in the chancery cause of *Ruffner and Long v. Donnally and others* pending in the Circuit Court of Kanawha county, a decree was entered directing the receiver to lend out certain money in his hands to the credit of said suit. In pursuance of said order W., the receiver, loaned to S. \$125.00 and took a promissory note therefor payable on demand to W., receiver of the Circuit Court of said county with interest from date, the 5th day of January, 1886, the note showing on its face that it was given for money borrowed from the chancery cause of *R. & L. v. D. et als.* W. died, and L. was appointed general receiver of said court in his stead June 2, 1877. G. S. L., as special receiver, was directed on the 10th of April, 1884, he having been appointed such special receiver, to collect said fund, and in pursuance of said direction he instituted this suit against S. and filed his declaration in the month of November, 1885. The defendant interposed the plea of the statute of limitations, to which the plaintiff objected and replied generally but filed no special replication. *Held*: The claim, upon which said suit was predicated, was barred by the statute of limitations, and if the plaintiff relied upon any of the statutory or other exceptions to take said claim out of the operation of said statute, it should have been set forth in a replication to said plea. *Laidley v. Smith* 387.

See *Fraudulent Conveyance* 8, 10 ; *Revival of Judgment* 1.

MANDAMUS. See *Elections* 1; *Jurisdiction* 2.

MARRIED WOMAN. See *Decd* 2-7; *Fraudulent Conveyance* 7; *Husband and Wife* 1-7.

MAYOR. See *Corporation* 13.

MORTGAGE.

1. A mortgageor left in possession of the mortgaged premises is entitled to the rents, issues and profits of them without rendering an account of them to the mortgagee, who can never recover them from him. The mortgageor is regarded in equity as the real owner of the property, a court of equity regarding a mortgage as a mere security, and the mortgagee, though the legal title be in him, as having a chattel-interest. *Childs v. Hurd* 66.
2. If therefore a suit to foreclose a mortgage whether of real or personal property be brought by the mortgagee, the mortgageor will continue pending the suit to take the rents and profits or use of the mortgaged property, unless the court by its order appoint a receiver, and he takes possession of it. Till the receiver takes actual possession of the mortgaged property, the mortgageor in possession takes the rents, issues and profits or has the use of the property as owner without rendering an account thereof. *Id.*
3. But after forfeiture the mortgagee has a right to take possession of the mortgaged property and hold the same without rendering an account of the rents, issues and profits other than applying them to the payment of the debt secured by the mortgage. *Id.*
4. If the suit brought by the mortgagee be not a simple suit to foreclose the mortgage, but it be brought also to require an agent of the mortgageor in possession and use of the mortgaged property to render an account and to have the rents and profits taken possession of and paid over to the parties entitled to them or having a lien or claim on them, such agent and all having any lien or claim to such rents will be regarded, as though he had been a receiver appointed by the court, and the rents, issues and profits of the mortgaged premises will be ordered to be paid into the court by him; and the court will dispose of the same according to the rights of the parties; and in such case the mortgagee will have a superior right to such rents, issues and profits to any creditor acquiring a lien on them subsequent to the institution of the suit. *Id.* 67.
5. If in such suit the mortgaged premises is a lease of lands to the mortgageor for the purpose of mining coal or iron on the same during the continuance of the lease, and the lessor retains a certain amount on every ton of coal or iron mined as royalty with or without a provision in the lease, that no coal or iron shall be moved off the premises, till such royalty be paid, such landlord has a right to be paid before the mortgagee out of any funds in the hands of the agent of the mortgageor arising out of the

MORTGAGE.—Continued.

sale of coal or iron mined on the premises, and paid into court.
Id.

6. A railroad is built on such leased premises in order to facilitate the mining of such coal and iron ore. Such railroad passes to the mortgagee in a mortgage made by the lessor of such land; and, if the proceeds of the sale of such iron of said railroad track come into the hands of the court in such suit, they will be directed to be paid to the mortgagee in preference to any lienor subsequent to the recording of such mortgages. *Id.*
7. In such a suit none of the defendants, creditors of the mortgageor, can gain any priority over other defendants by levying an attachment pending such suit on an agent of the mortgageor having such leased premises in his possession.
8. An entry of satisfaction by the mortgagee, after he has parted with his interest in the security, will not discharge the mortgage in favor of one who had acquired an interest in the land before the discharge was made. *Fidelity Co. v. Railroad Co.* 245.
9. A mortgage is executed by a railroad company on its property to secure bonds to be issued thereunder, which provides, that upon the full payment of all said bonds at maturity the trustee shall release the same. Before the maturity of the bonds, they are surrendered to the trustee, upon an agreement that other bonds to be issued under a subsequent mortgage are to be substituted for them. The trustee, without substituting such other bonds executed a release of the mortgage, stating therein that all the bonds "had been surrendered." The railroad company was not in a condition to anticipate the payment of its bonds, and had executed several other mortgages to take up bonds issued under former mortgages. *Held:* These facts and circumstances were sufficient to charge a subsequent mortgagee with notice of the terms and conditions upon which the bonds under said released mortgage had been surrendered, and he takes subject to the rights of those entitled to the bonds under said agreement.
Id.
10. The cancellation of a mortgage on the record is only *prima facie* evidence of its discharge, and the owner may prove that the cancellation was done by fraud, accident, or mistake, and, if he does this, his rights will not be affected by the improper cancellation of it. *Fidelity Co. v. Railroad Co.* 245.
11. Where the road of a railroad company passes into two states, in each of which it is a domestic corporation, and the trustee in a mortgage upon the whole road first brings a suit in one state to foreclose the mortgage, and afterwards brings an ancillary suit in the other state for the same purpose, the plaintiff in said suits can not object to or prevent a lien-creditor of the railroad company, who has not filed his claim in the first suit, from intervening in the second to establish his lien. *Id.*
See *Notice* 1, 2.

MUNICIPAL CORPORATIONS. See *Corporations* 1-3, 9, 10, 11, 12, 13.

NEGLIGENCE. See *Ex'rs and Adm'rs* 6; *Railroad Companies* 3.

NEWLY-DISCOVERED EVIDENCE. See *Bill of Review* 1-4.

NEW MATTER. See *Answer* 1.

NEW TRIAL.

1. When in any civil suit there is an order made granting a new trial, a writ of error will lie from such order, either before or after the new trial has been had, and without regard to the finding on such new trial. *Gwynne v. Schwartz* 487.
3. The verdict of a jury ought not to be interfered with, and a new trial awarded by the court, when the evidence is contradictory, if, when most favorably considered in support of the verdict, it does not still appear, that the verdict was plainly not warranted by the evidence. *Id.*
See *Boundaries* 6.

NOTICE.

1. Notice to a trustee is notice to the *cestui que trust*; and this rule applies to trustees under an ordinary mortgage made by a railroad company to secure the holders of bonds issued under it. *Fidelity Co. v. Railroad Co.* 244.
2. Where a subsequent purchaser has actual notice that the property in question was incumbered or affected, he is charged constructively with notice of all the facts and instruments to the knowledge of which he would have been led by an inquiry into the incumbrance or other circumstance affecting the property of which he had notice. *Id.*
3. A case in which the trustee and *cestui que trust* are held to be purchasers for value without notice under the evidence and special facts and circumstances proven. *Connell v. Connell* 319.
4. To charge a *bona fide* purchaser with notice, either express or implied, the notice must be something more than a vague statement that the vendor's title is subject to an equity. *Id.*
5. A. having the equitable title to real estate executed a trust-deed thereon to secure a debt to B., and said deed was duly recorded. Subsequently A. sold the property to C., and by direction of A. the holder of the legal title conveyed the same by deed directly to C., who, after his deed had been recorded, executed a trust-deed upon the real estate to secure a debt to D. *Held*: The recordation of said trust-deed to secure a debt to B. did not operate as constructive notice to D., and the lien of D. will have priority over that of B., unless B. shows, that D. had actual notice of the existence of his deed at the time D. acquired his lien. *Sands v. Beardsley* 595.
See *Sheriff* 1; *Specific Performance* 3.

NUISANCE.

An individual can not enjoin a public nuisance such as the obstruction of a road, unless it works special and peculiar injury to him, and that injury must not be trivial, or such as may be compensated in damages, but must be serious affecting the substance and value of the plaintiff's estate. The 1st point of Syllabus in *Bridge Co. v. Summers*, 13 W. Va. 476 re-affirmed. *Talbott v. King*. 96.

OBJECTIONS. See *Insurance* 3.

ONUS PROBANDI. See *Contract* 3.

PAROL CONTRACT. See *Specific Performance* 4-11.

PARTIES.

The personal representative must be a party before debts can be decreed against a decedent's estate. *Smith v. Turley*?
See *Husband and Wife* 9, 10; *Vendor's Lien* 1, 2.

PARTNERS AND PARTNERSHIP.

All the partners must be served with process for judgment against all. *Ferguson v. Millender* 31.
See *Executors and Administrators* 1-3.

PERSONAL REPRESENTATIVE. See *Parties* 1.

PRESIDENT OF THE SENATE. See *Vacancy in Office* 1-5.

PRINCIPAL AND SURETY.

J. O. C., W. C., and T. executed a note to one Susan Spiller, in which J. O. C. was principal, and the others were sureties. Suit was brought on said note, and satisfaction was obtained out of the property of T., in the county of Tazewell. During the pendency of proceedings to enforce the collection of said note, T. died, and W. C. and A. G. C. transferred to the executors of T. two several notes made by M. to W. C., for \$3,100.00 each, which purported to be secured by vendor's lien on certain lands, which had been conveyed to M. by said W. C. and A. G. C., to indemnify the estate of T. for the amount recovered from it by said Susan Spiller. Suit was brought by the executors of T. to enforce said vendor's lien, but it proved unavailing, for the reason that the proceeds of the land, when sold, were absorbed almost entirely by prior liens thereon, which existed against W. C. and A. G. C. Said executors obtained judgment on one of said notes in Washington county, where M. resided, and sought to prove said judgment, which was in the name of W. and A. G. C., for the use of said executors in a chancery suit pending in said county, but it was rejected both by the commissioner and the court. Said executors and the devisees of T. then brought a suit in equity in the Circuit Court of McDowell county in this state in the nature of a foreign attachment, to subject the lands of J. O. C. therein

PRINCIPAL AND SURETY.—*Continued.*

situated to the payment of the amount, which the estate of T. had paid for him as surety, and also the amount, which had been recovered from T. in his lifetime. An attachment was sued out and levied on said lands, and an order of publication taken and executed against the defendants. W. C., one of the defendants, appeared and required security for costs, which was given, made a motion to quash the attachment, which was sustained, demurred to the bill and filed his answer in October, 1877; and at the October term, 1881, of said Circuit Court, a decree was rendered against the defendants for the amounts claimed in the bill; and the lands of J. O. C., which had been levied on under an attachment, were directed to be sold under the attachment-*lien*. Afterwards the defendant J. O. C. appeared, petitioned for a rehearing, and said decree was set aside, and he filed his answer. The court sustained the demurrer; allowed the plaintiffs to amend at bar, gave a personal decree against the defendant J. O. C., and held that the plaintiffs had a *lien* by virtue of said attachment, and directed a sale of said lands to satisfy the plaintiffs' claim. **HELD:**

- I. The notes transferred to the executors of T. by W. C. and A. G. C. having proved worthless by reason of a failure of consideration, the question of diligence on the part of said executors is not material in this case.
- II. Although an attachment sued out in this case appears to have been quashed, yet, the decree of the court below reciting, that the cause was heard upon the attachment duly levied upon the lands of J. O. C., in this Court said attachment must be taken to have been in full force and effect, duly sued out and levied as required by statute.
- III. Under the circumstances of this case it was not incumbent on the executors of T. to appeal from the decision of the Circuit Court of Washington county rejecting the judgment in their favor against M. before resorting to the property of J. O. C. for reimbursement.
- IV. The demurrer to the bill having been sustained, and the plaintiffs having amended at bar, and the defendants neither asking delay nor demurring to the bill as amended, there was no good reason for delaying the hearing of the case.
Taylor v. Cox 148.
See *Bond* 2.

PROCESS. See *Partners and Partnership* 1.

PROHIBITION. See *Jurisdiction* 1, 2.

PROMISE. See *Sale* 3, 4.

PUBLIC ROAD.

1. Mere *user* of a road will not make it a public road under Code (1887,) c. 43, s. 31. The *user* must be accompanied either by an order of the County Court recognizing it in some way as a road,

PUBLIC ROAD.—Continued.

or the road must be worked by a surveyor as such. Dedication by the land-owner though accompanied with public user will not make it a public road, unless the dedication be accepted either by the County Court in its order-book or by a surveyor's working it. *Talbot v. King* 6.

See *Nuisance* 1.

RAILROAD COMPANIES.

1. In an action under our statute Code, c. 103, to recover damages for causing the death of a party the declaration is not demurrable, simply because it names the widow and children of the defendant and avers, that the damages claimed by the plaintiff accrued to them. Such parts of the declaration will be treated as surplusage. *Searles v. Railway Co.* 37.
2. The declaration in an action under said statute, which avers, that the decedent was killed by the oversetting and throwing down of the railroad car, in which he was at the time being carried by the defendant as a passenger, and that said oversetting and throwing down of the car were caused by the negligence of the defendant, is not demurrable, on the ground that the allegation is too general. *Id.*
3. The following instructions are not erroneous in an action brought under said statute to recover damages for the causing of the death of a husband and parent by the negligence of a railroad company: "(2) The law in tenderness to human life and limbs holds railroad companies liable for the slightest negligence and compels them to repel by satisfactory proofs every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require, that they be held to the greatest possible care and diligence. (3) The Kanawha & Ohio Railway Company as a common carrier of passengers was bound to exercise the utmost degree of diligence and care in safely transporting Daniel Searles upon his journey. (4) The slightest neglect, against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, renders such company liable in damages for such death. (5) Said railroad company is held by the law to the utmost care not only in the management of its trains and cars but also in the structure, repair and care of the track and bridges and all other arrangements necessary to the safety of passengers. (6) The jury are instructed that in estimating the pecuniary injury they may take into consideration the nurture, instruction, and physical, moral, and intellectual training, which the children would have received from their father. (7) The jury are instructed that while they must assess the damages with reference to the pecuniary injuries sustained by the distributees in consequence of the death of Daniel Searles, they are not limited to the losses actually sustained at the precise period of his death, but may include

RAILROAD COMPANIES.—*Continued.*

also prospective losses, provided they are such as the jury believe from the evidence will actually result to the distributees as the proximate damages arising from the wrongful death." *Id.*

See *Corporations* 8.

RECEIVERS. See *Limitations of Actions* 1.

RECITAL. See *Fraudulent Conveyance* 1.

RECORD.

1. A judgment-creditor in his bill to enforce his judgment-lien alleges, that he files as a part of his bill copies of his judgment and of the lien-docket marked "Exhibits B and C"; but Exhibit B, the copy of the judgment, is not found among the papers copied as a part of the record. It is so probable, that Exhibit B never was filed but exists, and it is so necessary to a just decision of the case, that this Court will remand the case to the court below, in order that the plaintiff may have an opportunity to supply said exhibit. *Love v. Tinsley* 25.
 2. Point 1 of syllabus in *State v. Miller*, 26 W. Va. 108, considered and re-affirmed. *Laidley v. Smith* 387.
- See *Appeal* 4.

RECORDATION OF DEEDS. See *Notice* 6.

REMOVAL OF CAUSES. See *Bond* 1; *Corporations* 7, 8.

REPLICATION. See *Answer* 1; *Limitations of Actions* 1.

RESCISSION OF CONTRACT.

1. On the 12th day of April, 1882, M. executed to I. a deed of conveyance for certain lots of land in Greenville Wirt county, W. Va. in consideration of \$600.00, \$200.00 of which was paid in cash, and the residue to be paid in one, two, three and four years after date in payments of \$100.00 each, and the vendor's lien was retained to secure the payment of said deferred instalments. In 1884, I. insured the house situated on said lots in the North British & Mercantile Insurance Company for \$500.00; and the said house was destroyed by fire February 5, 1896. Subsequently an agreement in writing dated in January, 1885, was entered into between M. and I., whereby it was stipulated, that I. should remain in possession of said lots until the 1st day of March, 1886, on the following conditions, viz: That she, the said I., should take care of said property keep the taxes paid up to that date and peaceably surrender possession of said property to the said M., give up the deed, which she then held, and the said M. should give up the notes she might then hold against said I., and the whole former trade or sale of the property should be rescinded; but if the said I. should meet all the payments due to that date with a probability of meeting the remaining deferred pay-

RESCISSION OF CONTRACT.—Continued.

ments, then the original contract to remain in full force; otherwise to be null and void. Upon a bill filed in June, 1886, to enforce said vendor's lien against I., she filed said agreement of January, 1885, with her answer and relied upon the same as a release of said vendor's lien and a rescission of the contract to pay the residue of said purchase-money. **HELD:**

- I. By said agreement of January, 1885, said vendor's lien was released, and the contract to pay the residue of said purchase-money was rescinded. *McCutcheon v. Ingraham* 378.
- II. Notwithstanding said agreement to rescind said contract of sale, until said rescission was consummated by exchange of deed and notes, the defendant, I., still retained an insurable interest in said property on the 5th of February, 1886, when said property was destroyed by fire, and was entitled to the benefit of said policy of insurance. *Id.* 379.

RESULTING TRUST. See *Husband and Wife* 1-4.**REVERSAL OF JUDGMENT.**

1. A case in which a decree of the Circuit Court is reversed upon the facts. *Jones v. Gillespie* 343.
2. Where a subsequent decree is based solely upon a previous decree in the same cause, the reversal of the latter will necessarily result in the reversal of the former. *Id.*
3. Where a case is tried by the court in lieu of a jury, the appellate court must regard the case as upon a demurrer to the evidence; and it will not reverse the judgment of the trial-court, upon the ground that it is contrary to the evidence, unless after disregarding all the conflicting evidence of the defendant in error there is not sufficient legal evidence in the case to warrant the judgment. *Lewis v. Alkire* 504.
4. The matter of the order and time of the introduction of evidence is largely in the discretion of the trial-court, and will not be interfered with by the appellate court, where no injustice has been done. *Id.*
5. When a bill of exceptions contains a certificate of all the testimony offered, instead of all the facts proved, the court can not reverse the judgment of the court below for refusal to set the verdict aside as contrary to evidence, unless by rejecting all the conflicting evidence of the exceptor, and giving full force and credit to that of the adverse party, the decision of the court below is plainly wrong. *Chenoweth v. County Commissioners* 629.
See *Issue out of Chancery* 1.

REVIVAL OF JUDGMENT.

1. Under sections 11, 12, ch. 139, of the Code a judgment can be revived by *scire facias* against the personal representative of the debtor within ten years from the return-day of the last execution, though that time may be more than ten years from the date

REVIVAL OF JUDGMENT.—*Continued.*

of the judgment: provided such revival be made within five years from the qualification of such representative. *Sherrard v. Keiter* 144.

SALE.

1. When the iron on a railroad is sold under an execution as personal property, but the proceeds are brought into a court of equity to be disposed of to the proper parties, such proceeds should be paid by the order of the court to the owner of the lease not to the execution-creditor. *Childs v. Hurd* 68.
2. R., administrator of M., filed a bill in the County Court of Kanawha county in April, 1876, against W. and others to enforce a vendor's lien on a lot of land situated in Charleston, W. Va., then owned and claimed by W. R. acted as solicitor for plaintiff and was appointed special commissioner to make the sale in June, 1876. After being offered on several occasions, and the sale postponed at one time to accommodate W., said lot was sold on the 25th day of November, 1876, for \$700.00, which appears to have been all it was worth at the time. B. H. and R., as such administrator, became the purchasers. The sale was confirmed without exceptions on the 20th day of December, 1876, and the purchasers went into possession and have so continued. After the application of the proceeds of said sale there was left a balance due said administrator, and a decree was rendered against W. for said balance, which was voluntarily paid by W., October, 28, 1881. Since said sale said property has increased in value from several causes, and when this suit was brought, in 1887, was worth about \$3,000.00. *Held*: The decree appointing R. a special commissioner to make sale of said lot and the decree confirming the purchase by R. as such administrator, were voidable, and could have been so shown by W. in the suit, which directed the sale, to which he was a party, if he had been so disposed. *Walker v. Ruffner* 297.
3. Where A. for a valuable consideration paid by him purchases property of B., which is by the terms of the sale to be conveyed to C. and is afterward so conveyed, and C. promises in consideration thereof to pay a debt due from A. to D., the promise of C. to pay such debt though not in writing is binding on him, if assented to by D. *Hooper v. Hooper* 526.
4. After C.'s death D. is a competent witness to prove C.'s promise. *Id.* 527.
See *Vendor and Vendee*.

SEAL. See *Contract* 1, 2.

SEDUCTION. See *Breach of Promise of Marriage* 2.

SEPARATE ESTATE. See *Fraudulent Conveyance* 7; *Husband and Wife* 5, 6, 9, 10.

SERVICE. See *Attachment* 1.

SET-OFF. See *Evidence* 1.

SHERIFF.

1. A notice to a sheriff under sec. 35, c. 41, Code 1887 may be in the name of the plaintiff in the motion and need not be in the name of the state for the use of such plaintiff. *Lyon v. Horner* 433.
2. A sheriff levies a writ of *feri facias* upon property; a claimant of the property gives a suspending bond; the sheriff returns the writ and said bond to the clerk's office and leaves the property in the possession of the debtor without security, and it is consumed by him; it is subsequently decided, that the property was liable for the writ; upon a motion by the creditor against the sheriff and his sureties, they will be held liable to the creditor for the value of said property. *Id.* 434.

See *Equity* 2.

SIDEWALKS. See *Corporation* 1-3.

SPECIFIC PERFORMANCE.

1. In a suit by vendor to enforce the payment of purchase-money under an executory contract for the sale of land, if defendant alleges a defect title of vendor, he may have a reference to ascertain the character of the title, or the court may, where the proof raises a doubt as to title, make such reference; but unless such reference be asked by the vendee, or such doubt appear, such reference is not necessary, and the court may proceed to subject the land to sale for the purchase-money. *Core v. Wigner* 277.
2. If at the date of the decree of sale the title, though originally defective, has become good by reason of the purchaser's possession under the statute of limitations, the court may go on to enforce the contract. *Id.* 278.
3. A vendor, who after sale to a vendee sells and conveys the same land to another without notice to the second purchaser of the first sale, is for that reason estopped from collecting by specific performance of the contract from the first purchaser the purchase-money for the land sold to the second purchaser. *Id.*
4. A court of equity will enforce a verbal promise made by a father to a son in consideration of love and affection to give him land and to make him a deed therefor, if the son induced by such promise has taken possession of the land and expended on it labor and money in improvements. *Frame v. Frame* 463.
5. But if, when such gift was made, the father required the son in a given time to put specified improvements on the land, such requirement would be regarded as a condition precedent to the right of the son to demand a deed; and the son, before he could acquire such deed, would have to prove that he put on the land in the time specified the specified improvements. *Id.*
6. When the donor (the father) has put the donee (the son) in possession of the land, and the donee has fulfilled the conditions precedent attached to his gift and by improvements on the land acquired the equitable title thereto, a court of equity will regard

SPECIFIC PERFORMANCE.—*Continued.*

- the donor as trustee for the donee, and the possession of the donee of itself conveys notice to the world of his equitable title, and of his right to the legal title. *Id.* 464.
7. But if the donor sells this land, and the legal title passes into the hands of persons, who are purchasers for valuable consideration without any actual notice of the donee's equity, and if the donee knowing that the donor has parted with his legal title instead of promptly asserting his right to demand the legal title to the land delays the assertion of such demand for nineteen years and until after the death of the donor and of all others present, when the verbal gift was made, a court of equity will not enforce the making of the legal title to such land to such donee because of his laches. *Id.*
 8. In such case, even if the rights of a third person had not intervened, a court of equity, if a suit to compel the donor to convey the legal title to the donee was not instituted for thirty one years, would not grant relief, if there was any trouble about the terms of the agreement or the conditions, on which the deed was to be made by the father to the son. *Id.*
 9. A written contract is entered into for the exchange of lands, and it is so far executed, that each party puts the other in possession of the lands exchanged, but deeds are not executed to complete the exchange. The parties then entered into an executory parol contract, whereby they annul the first contract of exchange, and it is put into effect partially by one of the parties restoring to the other the possession of his land. The court will enforce such contract of rescission thus partially executed. *Boggs v. Bodkin* 566.
 10. A court of equity will not enforce a parol contract for the sale or exchange of land, unless the terms of the contract are admitted or clearly proven. *Id.*
 11. Such parol contract will not be specifically enforced, unless it be proven, that the parties have good titles to their respective lands and, if the validity of the plaintiff's title is dependent on the question, whether he has had ten years' adversary possession of the land, he must, before he can enforce such contract, specifically establish by clear evidence, that he has had such adversary possession for ten years; and if he has declined to defend an action of ejectment brought by a stranger to test his title, this will be regarded as showing, that his title is so doubtful, that the court ought not to require it to be received as a good title by the other party and, the plaintiff being unable to make the other party a good title, the contract ought to be rescinded. *Id.* 567.
 12. J. M. B. by his attorney in fact, T. M., executed a title-bond to J. J. N., dated September 18, 1848, in which is recited the fact, that J. M. B. by his attorney, T. M., had bargained and sold unto the said J. J. N. 150 acres of land more or less lying in a certain boundary situate on the right-hand fork of Steer run, for the consideration of one dollar *per* acre, and said B. binds himself upon the payment of the purchase-money to make unto said J.

SPECIFIC PERFORMANCE.—*Continued.*

J. N. a good and sufficient title to the said 150 acres of land to be laid off in an oblong *squire*, and shortly afterwards said attorney in fact surveyed and marked said 150 acre tract, and J. J. N. took possession and lived upon the same and cultivated and improved it until his death, which occurred in 1865, and on the 17th day of August, 1862, J. M. B. receipted to J. J. N., for two notes on J. L. aggregating the \$120.00, which when collected were to be applied on said purchase-money, which notes, the evidence shows, were collected by said J. M. B., who admits in his answer to a bill filed to specifically enforce said contract, that said title-bond dated September, 1848, was treated as ratified. *Held* : In a suit brought, in June, 1875, by the heirs-at-law of J. J. N., to enforce specific performance of the contract the plaintiffs were entitled to specific performance of said contract under the circumstances proven in the case, and said claim is not barred by the lapse of time or the statute of limitations. *Norman v. Bennett* 614.

STATUTE OF LIMITATIONS. See *Deed* 7; *Fraudulent Conveyance* 8, 10; *Husband and Wife* 2, 6; *Limitations of Actions*; *Revival of Judgment* 1; *Specific Performance* 12.

STREETS. See *Corporations* 1-3.

SUPREME COURT OF APPEALS. See *Costs* 1; *Jurisdiction* 1-3.

SURETIES. See *Bills of Exchange and Prom. Notes* 1, 2; *Bond* 2; *Executors and Administrators* 1-4; *Sheriff* 2.

SURPLUSAGE. See *Railroad Co's* 1; *Sheriff* 2.

TAXATION. See *Corporations* 10, 12.

TITLE. See *Deed* 14; *Ejectment* 1, 2; *Specific Performance* 1, 2; *Vendor and Vendee* 1 (II.)

TOWNS. See *Corporations* 1-3, 9-12.

TRIAL BY THE COURT. See *Reversal of Judgment* 3, 4.

TRUSTS AND TRUSTEES.

1. A trustee acting strictly within the line of his duty and exercising reasonable care and diligence will not be held responsible for the loss or depreciation of the trust-fund or the insolvency or misconduct of any person, who may have possessed it; but if that line of duty be not strictly pursued, and any part of the fund be invested upon securities not authorized or be put within the control of persons, who ought not to be intrusted with it, when there is no necessity for so doing, and a loss be thereby eventually sustained, such trustee will be liable to make it good however unexpected the result, however little likely to arise from the course adopted,

TRUSTS AND TRUSTEES.—*Continued.*

- and however free such conduct may have been from any improper motive. *Key v. Hughes's Ex'rs.* 184.
2. An executor is directed by will to invest a specified sum of money in interest-bearing bonds and pay the interest thereon to a legatee for life and after her death to divide the fund among her children. The executor applied to the cashier of a bank, who agreed to sell him United States bonds, but without seeing the bonds or knowing, that they were in the bank, the executor paid the cashier for them with the understanding, that they were to be held by the bank subject to his order. No bonds were in fact ever put in the bank on special deposit in the name of the executor or as his property, but the cashier paid to him, as the interest matured on such bonds, a sum equal to their interest. No inquiry was made by the executor for the bonds until after the failure of the bank nearly two years thereafter, when it was ascertained, that there were no bonds there; and if such bonds had ever been deposited there, they had been appropriated by the cashier long before the failure of the bank. *Held:* The executor is liable for the trust-fund. *Id.*
 3. Where the relation of parties is that of trustee and *cestui que trust*, the statute of limitations does not commence to run, until there has been an open denial and repudiation of the trust by the trustee bought home to the *cestui que trust* in such a manner as will require the latter to act as upon an asserted adverse title. *Id.*
 4. The trustee can only do with the trust property what the deed, either in express terms or by necessary implication, authorizes him to do. *Fidelity Co. v. Railroad Co.* 245.
See *Fraudulent Conveyance* 3-5; *Notice* 1.

UNDUE INFLUENCE. See *Wills* 1, 4, 5.

USER. See *Public Road* 1.

VACANCY IN OFFICE.

1. Where persons are voted for for governor at a regular election for the office of governor, but there has been no declaration of the result of the election by either the Speaker of the House of Delegates or the joint assembly of the two branches of the Legislature, and a contest for that office is pending before such joint assembly, and the declaration of the result has been by such assembly postponed until the decision of such contest, that does not create such condition of things, within the meaning of section 16, art. VII, of the constitution, as will entitle the President of the Senate to act as Governor. *Carr v. Wilson* 419.
2. In such case the governor elected for the next preceding term has the right and is under duty, by virtue of section 6, art. IV, of the constitution, to continue to discharge the duties of his office until a successor shall be declared elected. *Id.*
3. The act of taking the official oath prescribed for governor by a candidate voted for for governor at such election, before a declar-

VACANCY IN OFFICE.—*Continued.*

- ation of his election under section 3, art. VII of the constitution, would not entitle him to take office, and his inability to take office for want of such declaration of election, whether he attempts to qualify or not, would not entitle the President of the Senate to act as Governor. *Id.* 420.
4. A declaration of election to the office of governor, as provided for by sec. 3, art. VII, of the constitution, is indispensable to perfect and consummate the title to that office. *Id.*
 5. The provisions of the constitution limiting the term of office of governor to four years, and making him ineligible to re-election, do not prevent him from continuing to discharge the duties of his office after his term, under sec. 6, art. IV, of the constitution, in cases where the president of the senate can not act as governor, under section 16, art. VII, of the constitution. *Id.*

VENDOR AND VENDEE.

A sale is made under a deed of trust of a tract of land situated in Barbour county containing sixteen acres. S. bids in the property, but H., the *cestui que trust*, contends that it was bid in by S. at his (H.'s) request, and paid for with his money. S. transferred his equity acquired by his bid to different parties for valuable consideration but with the express understanding and agreement, that S. should obtain possession of said land and hold it against H. The equity aforesaid being transferred to W., he sued S. for a deed, and S. sued him for the purchase-money. The cases were heard together, and a decree was rendered that W. pay to S. \$200.00, the purchase-money for said equity, with interest from April 15, 1856; and that S. before receiving the same should procure the legal title to said sixteen acres. H. then brought a suit to establish his title to said sixteen acres, in which he succeeded said three cases being heard together. S. then waived his right to proceed against the land, but the court allowed him to sue out execution against the property of W. W. then filed a bill, reciting what had been done in the three cases, praying that S. be prevented from enforcing said execution, that the papers in said cases might be looked into, and that general relief might be granted him. **HELD:**

- I. The bill filed by W. under all the circumstances will be treated and considered as a bill of review.
- II. The title of S. to the sixteen acres of land in the bill mentioned having proved worthless, it would be inequitable and unjust to enforce a decree against W., his vendee, for purchase-money.
- III. A decree in favor of S., awarding execution upon a decree against W., which was conditioned upon his (S.'s) obtaining and holding the legal title of a tract of land, will be set aside, when a court of competent jurisdiction has decided the said legal title not to be in S. but in some other person.

West v. Shaw 195.

See *Specific Performance* 1-3.

VENDOR'S LIEN.

1. In a suit to enforce a vendor's lien on land it is not error to decree a sale of such land to pay said lien without making other creditors having subsequent liens thereon parties and ascertaining the amounts and priorities of their debts. *Arnold v. Coburn* 272.
2. If the land, on which the vendor's lien exists, has been conveyed by trust-deeds to secure debts, it is proper in such suit to make the trustees in such trust-deeds parties, but it is not necessary to make the *cestuis que trust* in such deeds parties before decreeing in favor of the person holding the vendor's lien. *Id.*
See *Reclamation of Contract* 1.

WILLS.

1. The direction and trial of the issue of *devisavit vel non* is a proceeding under our statute to impeach or establish a will after a sentence or order made by the County Court or by its clerk and confirmed by the County Court; but it is not an appellate proceeding, and the Circuit Court in such a proceeding does not pass upon the regularity or irregularity of the proceedings to probate said will before the clerk or County Court. *Coffman v. Hedrick* 119.
2. Upon a bill in chancery to contest the validity of a will, which has been admitted to probate, the functions of the suit are exhausted, when that question is decided. *Id.*
3. One of the attesting witnesses to a will, who is a brother to the party, who is claimed to have made the will in controversy, and who is introduced by the contestees to prove the execution of the paper in the absence of the other subscribing witness, who can not be found after diligent inquiry, although said witness so introduced is a party to the suit brought to impeach the validity of said will, and would inherit a portion of the property devised in the absence of said will, yet, if he is unprovided for in said will, he is not incompetent under the Code of West Virginia c. 130, s. 23 to testify in support of said will as to its proper execution. *Id.*
4. Where a party is shown to have mental capacity sufficient to make a will, in the absence of fraud or undue influence the validity of the will can not be impeached, however unreasonable or unaccountable it may seem to others.
5. Upon the trial of an issue of *devisavit vel non* undue influence, in order to overthrow the will, must not only be alleged, but it must be proven by the contestants; it will not be inferred. *Id.* 120.

WITNESS. See *Evidence* 2-4; *Sale* 3, 4; *Wills* 1-3.

WRIT OF ERROR.

1. An order overruling a motion to set aside a verdict of a jury and refusing to grant a new trial is not such an order or judg-

WRIT OF ERROR.—*Continued.*

ment as will authorize a writ of error to this Court. *Damron v. Ferguson* 33.

2. In order to authorize a writ of error there must be a final judgment on the verdict. *Id.*

See *New Trial* 1.

WRIT OF POSSESSION. See *Husband and Wife* 9, 10.

in. J. J. J.



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